Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ERNESTO D. SIGMUND AND WILLIAM GREGORY HASSLER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Roger L. Mandel, *Counsel of Record*
Marc R. Stanley
STANLEY, MANDEL & IOLA, L.L.P.
3100 Monticello Avenue, Suite 750
Dallas, Texas 75205
(214) 443-4300
(214) 443-0358 (Fax)

Counsel for Petitioner

9 6 pp

QUESTIONS PRESENTED

1. Whether Section 7422 of the Internal Revenue Code shelters from suit businesses which fraudently collect funds from their customers under the guise of a non-existent tax.

2. Alternatively, whether consumers who have had certain excise taxes improperly collected from them by a business acting as a private collecting agent for the Internal Revenue Service have an implied cause of action under 26 U.S.C. § 6415 to recover from the private collecting agents.

TABLE OF CONTENTS

PAGE

Questions Presented i
Table of Contents ii
Table of Authorities iii
Index to Appendices vi
Opinions and Orders Below 1
Jurisdiction 1
Statutes and Regulations Involved 1
Statement of the Case 1
Reasons for Granting the Writ 8

I.

The Fifth Circuit Committed an Error of Law in Not Unequivocally Holding *Enochs* applicable to 26 U.S.C. § 7422 10

II.

The Fifth Circuit Incorrectly Applied *Enochs*, Resulting in its Erroneous Holding that Southwest Had a Colorable Basis for Collecting a Non-Existent Excise Tax 14

III.

Alternatively, the Fifth Circuit Erred in Holding That 26 U.S.C. § 6415(c) Does Not Provide Sigmon and Hassler a Federal Cause of Action Against Southwest, if Necessary 19

Conclusion 29

Appendices ..... *infra*

TABLE OF AUTHORITIES

CASES: PAGE

Brennan v. Southwest Airlines, Case No. 96-17053 (9th Cir.) 8

Cannon v. The University of Chicago, 444 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979) 7, 25, 27-28

Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L.Ed.2d 26 (1975) 7, 24, 28

DuPont Glore Forgan, Inc. v. American Tel. & Tel. Co. (AT&T), 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2nd Cir.), *cert denied*, 439 U.S. 970 (1978) 21

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 82 S. Ct. 1125, 8 L.Ed. 2d 292 (1962) 6, 9-15

Kaucky v. Southwest Airlines Co., 109 F.3d 349 (7th Cir. 1997) 8, 12, 14-16

Miller v. Standard Nut Margarine Co. of Florida, 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422 (1932) 14-16

Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977) 26

Sigmon v. Southwest Airlines Co., 110 F.3d 1200 (5th Cir. 1997) 1, 6-7, 10-11, 13, 16, 21, 23-24, 26, 28

Thompson v. Thompson, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988) 25-26

STATUTES:	PAGE
Internal Revenue Act of 1918 § 1310(a)	22
Internal Revenue Act of 1939 § 1715(d)	22
26 U.S.C.A. § 4261(a) (West Supp. 1996)	2-4, 8, 16-20
26 U.S.C.A. § 4261(b) (West Supp. 1996)	20
26 U.S.C.A. § 4261(g) (West Supp. 1997)	8, 16-19
26 U.S.C.A. § 4261(g) (West Pamphlet May, 1997)	8, 16-19
26 U.S.C.A. § 4263(c) (West 1989)	17-18
26 U.S.C.A. § 4263(d) (West 1989)	17-18
26 U.S.C.A. § 6415(a) (West 1989)	9, 12, 19, 21-23, 27-28
26 U.S.C.A. § 6415(b) (West 1989)	9, 12, 19, 21-23, 27-28
26 U.S.C.A. § 6415(c) (West 1989)	4, 6-7, 9, 19-24, 26-30
26 U.S.C.A. § 6415(d) (West 1989)	9, 12, 19, 21-23, 27-28
26 U.S.C.A. § 7421(a) (West 1989)	11, 12, 28
26 U.S.C.A. § 7422(a) (West Supp. 1997)	6-14, 17-19, 23, 28
26 U.S.C.A. § 7422(f)(1) (West Supp. 1997)	6-14, 17-19, 23, 28
28 U.S.C.A. § 1254(1) (West 1993)	1

REGULATIONS:	PAGE
26 C.F.R. §§ 29.0-1 to 49.04 (1976)	21
26 C.F.R. § 49.4261 to 49.4264(f) (1976)	21
26 C.F.R. § 42.0-4 (1967)	22
26 C.F.R. § 49.4261-4(a) (1976)	21
26 C.F.R. § 49.4264(c)-1(a)(1) (1976)	17
26 C.F.R. § 301.6415-1 (1976)	21
Treasury Regulation 42, arts. 51 and 52 (1932)	22
Treasury Regulation 42 §§ 130.77 and 130.78 (1942)	22
Treasury Regulation 43, § 1310(a) (1921)	22

INDEX TO APPENDICES

Appendix A -- Opinions and Orders of the United States Court of Appeals for the Fifth Circuit

Appendix B -- Opinions and Orders of the United States District Court, Northern District of Texas, Dallas Division

Appendix C -- Order Denying Petitioner's Motion for Rehearing before the Fifth Circuit

Appendix D -- United States Codes, Rules and Regulations

Appendix E -- Other Materials Petitioner Believes Essential to Understanding the Petition

PETITION FOR WRIT OF CERTIORARI

Petitioners, Ernesto D. Sigmon and William Gregory Hassler, individually, and on behalf of all others similarly situated, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case.

OPINIONS AND ORDERS BELOW

The April 28, 1997 opinion of the Fifth Circuit (App. A-1 to A-16) is recorded at 110 F.3d 1200. The order and judgment of the District Court granting summary judgment to Respondent, Southwest Airlines Co. ("Southwest"), is found in the Appendix at B-1 to B-3.

JURISDICTION

The Fifth Circuit entered its judgment (App. A-17) on June 5, 1997, after previously denying a timely petition for rehearing on May 28, 1997 (App. C-1). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Because of their length, the text of pertinent statutes and regulations are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

A. Factual Background

Due to the Fifth Circuit's decision, hundreds of thousands of Southwest's customers and, by extension, millions of customers of several airlines find themselves in a "Catch 22" of classic proportions. Having paid Southwest and the other airlines what all parties

agree was a fictional and non-existent tax, they now find it impossible to recover their money from either the airlines or the IRS, each of which claims the other is responsible for making such refunds.

Throughout the period from July 1995 through January 1996, Southwest knew that the ten percent (10%) excise tax imposed by 26 U.S.C. § 4261(a) on tickets sold for travel on or before December 31, 1995, had not been extended by Congress to apply to tickets sold for travel on or after January 1, 1996, and that no statute in force at any time in 1995 required it to collect an excise tax on tickets it sold in 1995 for travel on or after January 1, 1996. Nevertheless, based on its belief throughout the second half of 1995 that Congress and the President might extend the application of 26 U.S.C. § 4261(a) to tickets sold for travel on or after January 1, 1996, Southwest collected a 10% surcharge from customers who purchased tickets in 1995 for travel on or after January 1, 1996.

By December, 1995, it should have become patently obvious to the airline industry, including Southwest, that the 10% excise tax imposed by § 4261(a) would not soon be extended to tickets sold for travel in 1996. Specifically, on December 6, 1995, President Clinton vetoed budget legislation that would have extended the application of § 4261(a) to 1996 travel. Furthermore, during December, 1995, the media reported that the budget impasse made it highly unlikely that Congress and the President would extend § 4261(a) to 1996 travel anytime in the near future.

On December 6, 1995, by which time Southwest certainly should have known that § 4261(a) would not be applied to 1996 travel in the foreseeable future, Sigmon purchased a round-trip airline ticket for

$138.00 from Birmingham, Alabama, to Houston, Texas, from Southwest and paid for same in full by credit card. The ticket was for travel on December 29, 1995 (Birmingham to Houston) and January 5, 1996 (Houston to Birmingham). The purchase price included $12.54 which Southwest represented to Sigmon it was required to pay the federal government as "taxes," including $6.27 in "tax" on the January 5, 1996 Houston to Birmingham leg. The ticket itself, received via the mail by Sigmon for his trip, stated that Southwest was collecting $12.54 in "U.S. taxes" in addition to the $125.46 price of the airfare.

Sometime in late November, 1995, or early December, 1995, Hassler purchased a round-trip on a "ticketless" basis from Southwest for travel from Houston Hobby Airport to Harlingen International Airport and paid for same in full by credit card. The ticket was for travel on December 30, 1995 (Houston Hobby to Harlingen), and January 1, 1996 (Harlingen to Houston Hobby). The purchase price included a ten-percent "excise tax" on both legs of the trip that Southwest represented it was required to pay to the federal government.

Southwest learned of this action on January 5, 1996, and it received a copy of Plaintiffs' Original Class Action Petition on January 11, 1996. On January 10 and 25, 1996, despite knowing that Congress had not extended U.S.C. § 4261(a) and despite knowing that it had been sued for refund of amounts collected in 1995 as "excise taxes" on 1996 travel, Southwest paid approximately $18,000,000 to the IRS, thereby escaping any liability that it allegedly had to the IRS on account of amounts collected in December, 1995, as a ten

percent "excise tax" on tickets for travel on or after January 1, 1996.

Furthermore, on or about January 11, 1996, the IRS wrote the various airlines (App. at E-17 to E-19) requesting them to refund amounts improperly collected in 1995 as "excise taxes" on 1996 travel directly to their customers pursuant to 26 U.S.C. § 6415(c) and then to recoup same by taking credits on future excise tax payments to the IRS. At the same time, IRS spokesmen were quoted in the press as saying taxpayers should obtain refunds from the airlines. Despite knowing the IRS' opinion, on January 25, 1996, Southwest still paid over to the IRS a significant amount of money improperly collected in December, 1995, as an "excise tax" on travel in 1996, and it refused to make refunds pursuant to § 6415(c).

On February 9, 1996, the IRS issued an Announcement (App. at E-14 to E-15) that required consumers to submit Form 8849, Claim for Refund of Excise Taxes, to the IRS along with an original passenger receipt in order to obtain a refund. The two-page Form 8849 (App. at E-20 to E-21) does not, however, provide a specific place to make a claim for refund of § 4261(a) excise taxes. Furthermore, the four-page Instructions for Form 8849 (App. at E-22 to E-24) do not even reference refunds of this tax. A consumer would have to figure out by himself or herself to use Section Nine of the Form (the "other claims" section) to recover the amount fraudulently collected from him or her by Southwest, as illustrated by the sample Form 8849 (App. at E-25) showing how the IRS requires the form to be completed.

Because most people will not brave IRS bureaucracy to obtain refunds of less than $75.00, and due to

the difficulty in figuring out what IRS form to use and how to fill out that IRS form, relatively few of the millions of airlines customers (approximately 80,000) who are estimated to be owed in excess of $1 billion had attempted to obtain refunds directly from the IRS as of July 1, 1996. And due to the difficulty of filling out Form 8849 and the stringent requirement of supplying an original receipt, which most people do not retain, the IRS had rejected approximately 40% or 32,000 of the 80,000 refund claims it had received as of July 1, 1996.

Furthermore, after July 1, 1996, refund requests to the IRS slowed to a trickle. In May, 1997, IRS spokesmen said that in the first 14 months after the tax lapsed at the beginning of 1996, it had paid only 49,807 refunds averaging $55.19, less than $3 million, and far, far less than the $1 billion or more in non-existent taxes collected.

B. Proceedings in the Trial Court

Sigmon and Hassler filed Plaintiffs' Original Class Action Petition in the 298th Judicial District Court of Dallas County, Texas, on January 5, 1996. On February 8, 1996, Southwest removed this case to federal court. On February 15, 1996, Southwest moved to dismiss Sigmon's and Hassler's suit under FRCP 12(b)(1) and 12(b)(6).

On April 5, 1996, Sigmon and Hassler filed their response to the motion to dismiss. On that same day, they moved for leave to file Plaintiffs' First Amended Class Action Complaint. On April 8, 1996, the trial court granted Sigmon and Hassler leave to file Plaintiffs' First Amended Class Action Complaint, and they filed it that same day.

In their Amended Complaint, Sigmon and Hassler pled state-law causes of action for fraud, negligence, conversion and money had and received. They alternatively pled a federal cause of action pursuant to 26 U.S.C. § 6415(c).

On April 25, 1996, the trial court entered its Amended Order converting Southwest's motion to dismiss to a motion for summary judgment. On May 23, 1996, the Court held oral argument on the motion. That same day, the Court entered its Order and Judgment granting Southwest's motion for summary judgment and dismissing Sigmon's and Hassler's causes of action. Sigmon and Hassler timely filed their Notice of Appeal to the Fifth Circuit on June 10, 1996.

C. The Opinion of the Fifth Circuit

The Fifth Circuit entered its opinion affirming the summary judgment in favor of Southwest on April 28, 1997. *Sigmon v. Southwest Airlines Co.* 110 F.3d 1200 (5th Cir. 1997). In the opinion, the Fifth Circuit refused to concede that this Court's opinion in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 82 S.Ct 1125, 8 L.Ed.2d 292 (1962), creates a limited exception to 26 U.S.C. § 7422(a) and (f)(1). 110 F.3d at 1204. It then assumed, arguendo, that *Enochs* applied and held that Southwest acted with colorable authority when it collected the non-existent tax. *Id.* The Fifth Circuit so ruled without any analysis of how this Court had actually applied the *Enochs* "no colorable basis" exception and without any consideration of the relevant provisions of the Internal Revenue Code or of the relevant IRS regulations.

The Fifth Circuit also held that 26 U.S.C. § 6415(c) does not create a private cause of action under

the criteria set forth by this Court in *Cort v. Ash*, 422 U.S. 66, 78-79, 95 S.Ct 2080, 2088, 45 L.Ed.2d 26 (1975). Specifically, the Fifth Circuit held that nothing indicated that Congress intended § 6415(c) to create an exception to § 7422(a) and (f)(1) that would allow excise taxpayers to seek relief in the courts against private collectors. 110 F.3d at 1206. Amazingly, it so held on the basis of a presumption against implying causes of action that is absolutely incompatible with this Court's decisions, especially *Cannon v. The University of Chicago*, 444 U.S. 677, 99 S.Ct 1946, 60 L.Ed. 2d 560 (1979).

The Fifth Circuit concluded its opinion by noting that although it may "inconvenience" consumers, they can seek refunds of the purported excise taxes directly from the IRS. 110 F.3d at 1206. This statement by the Fifth Circuit ignored the extensive evidence detailed above that the IRS made it practically impossible for the vast majority of consumers to obtain refunds in order to encourage the airlines to handle the refunds for them.

Thus, customers of Southwest and other airlines find themselves in the extraordinary "Catch 22" referred to above. As a practical matter, because of the low amounts of their refund claims, the difficulty in figuring out and filling out the proper IRS form, and the requirement of supplying original receipts which they did not keep, millions of airline customers practically have no ability to recover over $1 billion from the IRS. Because of the Fifth Circuit's decision, they cannot recover from Southwest or any other airlines.

If it is true that the law abhors a wrong without a remedy, then the law abhors the Fifth Circuit's

opinion, although Joseph Heller would certainly appreciate it.

REASONS FOR GRANTING THE PETITION

In this case, following the lead of the Seventh Circuit, the Fifth Circuit decided two important federal questions in ways that directly conflict with relevant decisions of this Court.[1] The first important question of federal law is whether persons from whom money has been collected by a business as a "tax" despite the business not having even a colorable basis for collecting such a "tax" must brave IRS bureaucracy and file a refund claim with the IRS pursuant to 26 U.S.C. § 7422(a) and then file suit against the IRS pursuant to 26 U.S.C. § 7422(f)(1) or whether such persons can merely make a claim to and then sue the business under state law in state court.

This is an important question of federal law for two reasons. First, it affects millions of air passengers and other excise taxpayers who are likely in the future to be, and who likely already have been, frequently fleeced out of non-existent "taxes" when excise tax statutes expire. For example, the 10% excise tax imposed by § 4261(a) was extended to apply to travel taking place from August 1, 1996, through January 1, 1997, when the tax once again lapsed. 26 U.S.C.A. § 4261(g) (West Supp. 1997). The tax was renewed again on March 7, 1997. 26 U.S.C.A. § 4261(g) (West Pamphlet May, 1997). It is entirely probable that Southwest

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[1] *See Kaucky v. Southwest Airlines Co.*, 109 F.3d 349 (7th Cir. 1997). A Petition for Writ of Certiorari has been filed with this Court in that case. A case involving the same issues is also pending before the Ninth Circuit. *See Brennan v. Southwest Airlines Co., et al.*, No. 96-17053.

and other airlines collected "excise taxes" in late 1996 on tickets for travel in January and February of 1997, even though travel during those months in 1997 was not subject to any excise tax.

The second reason this question of federal law is so important is that the Fifth Circuit's decision invites substantial abuse by businesses. Because the Fifth Circuit refused to apply *Enochs* to § 7422, any business can fraudulently collect funds under the guise of a tax and pocket the money secure in the knowledge that if caught by the customers it fleeced, it can escape suit simply by stating that it collected a "tax," albeit erroneously, and pointing to § 7422(a) and (f)(1). Indeed, the Fifth Circuit's opinion invites a whole new species of fraud.

The second important question of federal law presented in this case is the question of whether a cause of action should be implied into 26 U.S.C. § 6415(c). This question is important because it will determine whether, in the future, when thousands or even millions of persons seek very small excise tax refunds, the IRS will be burdened with handling those thousands or millions of refund requests and excise taxpayers will be burdened with braving IRS bureaucracy to obtain those very small refunds or whether private collectors who erred in the first place must bear the burden of refunding the erroneously collected excise taxes and collectively and efficiently recouping same from the IRS as intended by Congress when it passed 26 U.S.C. § 6415.

I.

THE FIFTH CIRCUIT COMMITTED AN ERROR OF LAW IN NOT UNEQUIVOCALLY HOLDING *ENOCHS* APPLICABLE TO 26 U.S.C. § 7422

In its opinion, the Fifth Circuit stated that it would not decide whether the "no colorable basis" exception created by this Court in *Enochs* applies to 26 U.S.C. § 7422, because it found that Southwest Airlines acted with colorable authority when it collected the amounts in issue as "excise taxes." 110 F.3d at 1204. The Fifth Circuit erred in not unequivocally holding the "no colorable basis" exception of *Enochs* applicable to § 7422, because the rationale of *Enochs* applies with full force to § 7422 and because even the Fifth Circuit acknowledges that § 7422 cannot apply every time a business collects money from its customers under the guise of a "federal tax."

Sigmon and Hassler posed two hypotheticals to the Fifth Circuit in support of their position. In the first hypothetical, a law firm added a 10% surcharge to its fees and called it a "federal excise tax," when no such tax existed. In the second, an airline collected a fictitious 5% "carry-on luggage tax." Sigmon and Hassler argued that in those hypotheticals, because those funds were not conceivably "taxes," the government would have no interest in the collected funds justifying a requirement that a refund claim be made to the IRS, and the culpable tax collectors would not deserve the protection of § 7422, because they were not conceivably acting as mere agents for the government.

Significantly, the Fifth Circuit, in its discussion of these hypotheticals, apparently acknowledged the

correctness of Sigmon's and Hassler's argument that not every person who claims to have collected amounts as "taxes" is entitled to the protection of § 7422. *Id.* at 1203-4. Given this, the issue becomes under what standard courts should judge the applicability of § 7422. *Enochs* provides this standard.

In that case, this Court announced an exception to 26 U.S.C. § 7421(a), holding that statute inapplicable where *"...it is apparent, on the basis of the information available to the government at the time of suit, that, under the most liberal view of the law and the facts, the United States cannot establish its claim."* 82 S.Ct at 1129. That statute prohibits suits to restrain the assessment or collection of a federal tax.

This Court's rationale in *Enochs* for allowing taxpayers to enjoin the IRS from collecting certain taxes where the central purpose of § 7421(a) cannot be achieved (because the IRS could not prevail under any circumstances) applies equally to this case where the purposes of § 7422(a) and (f)(1) cannot be achieved by dismissing Sigmon's and Hassler's suit against Southwest. Neither the IRS nor Southwest could conceivably prove that Southwest properly collected the "excise taxes" in issue. Thus, this Court need not protect any interest of the IRS in the funds collected by Southwest by funneling Sigmon's and Hassler's claims into the refund procedures provided by the Internal Revenue Code.

Similarly, this Court need not protect Southwest from having to defend actions it engaged in as a "mere agent" of the IRS, because Southwest did not conceivably act as an agent for the IRS in collecting the fictitious "excise taxes." Rather, Southwest voluntarily misrepresented the existence of and collected the fictitious

tax, making it entirely just for Sigmon and Hassler to recover directly from Southwest and for Southwest to seek recovery, at its own peril, from the IRS.

Of course, Southwest undisputedly has the right under 26 U.S.C. § 6415(a) and (b) to recover from the IRS, via refunds or credits on future excise tax returns, all "excise taxes" it refunds as a result of this case; nevertheless, it stubbornly refuses to refund such amounts. 26 U.S.C.A. § 6415(a) and (b) (West 1989).

In *Kaucky v. Southwest Airlines Co.*, 109 F.3d at 349, heavily relied upon by the Fifth Circuit, the Seventh Circuit implicitly applied the "no colorable basis" exception of *Enochs* to § 7422 of the Internal Revenue Code. Specifically, it held that where a con man, posing as an IRS agent, collects and pockets "taxes" from gullible citizens, § 7422 does not apply, and the con man's victims have their usual state law remedies against the con man, because the con man did not have even a colorable basis to collect the funds in issue as "taxes." *Id.* at 352. Thus, the Seventh Circuit applied to § 7422 the "no colorable basis" exception to § 7421(a) of the Internal Revenue Code recognized by this Court in *Enochs*.

Significantly, the Seventh Circuit applied the *Enochs* standard exactly as articulated by Sigmon and Hassler in this case — whether Kaucky's suit against Southwest is a tax refund suit against Southwest preempted by § 7422 depends on whether Southwest had a colorable basis for collecting the amounts in issue as excise taxes despite the absence of a statute imposing such an excise tax.

In its opinion, the Fifth Circuit did not disagree with any of the reasoning offered by Sigmon and

Hassler as to why the "no colorable basis" exception of *Enochs* applies with equal force to § 7422. Rather, the Fifth Circuit merely stated in a footnote that applying such exception to § 7422 would allegedly open "Pandora's Box" in the form of many additional taxpayers bypassing the normal administrative tax refund process and filing state law claims. 110 F.3d at 1204, fn. 9. There is, however, no factual basis for the Fifth Circuit's statement.

Presumably, taxpayers would be just as, or even more, eager to prevent collection of taxes by the IRS or private collecting agents in the first place as they would be to obtain refunds (and, potentially, other damages) from purported private collecting agents in state court after taxes have already been collected from them. Crucially, there is no evidence that a flood of taxpayers filed injunction suits against the IRS or private collecting agents trying to prevent collection of taxes under the "no colorable basis" exception after this Court's decision in *Enochs* in 1962. Accordingly, there is no reason to believe the application of the "no colorable basis" exception to § 7422 would result in numerous state court lawsuits.

The reason is simple. *Enochs* provides an extremely narrow exception. In very few cases will a taxpayer be able to allege, in good faith and subject to court sanctions, that a tax was collected by a private collecting agent with no colorable basis for doing so. Fear of court sanction should prevent a flood of frivolous suits by taxpayers claiming that taxes were collected from them with no colorable basis for doing so. Indeed, this Court could emphasize the narrowness of the exception in its opinion.

The bottom line is that the risk of taxpayers and their lawyers filing frivolous suits is far outweighed by the perversion of the Internal Revenue Code that results if a con man is allowed to invoke the protection of § 7422 against a suit seeking recovery of amounts collected under the guise of a non-existent, fictitious tax. The Seventh Circuit implicitly so held in *Kaucky*, and so should this Court. Given the potential for repetition of this problem and the potential for fraud from a contrary ruling, this Court should explicitly recognize the only logical conclusion -- that the "no colorable basis" exception it recognized in *Enochs* applies to § 7422.

II.

THE FIFTH CIRCUIT INCORRECTLY APPLIED *ENOCHS*, RESULTING IN ITS ERRONEOUS HOLDING THAT SOUTHWEST HAD A COLORABLE BASIS FOR COLLECTING A NON-EXISTENT EXCISE TAX

While the Fifth and Seventh Circuits did not clearly articulate their methodology for determining that Southwest allegedly had a colorable basis for collecting the amounts in issue as excise taxes, both of their approaches can be summarized as creating the following two-prong test: (1) If the private party is an authorized collecting agent for the IRS as to some federal tax, and (2) if the private party claims the funds in issue were collected pursuant to some then-existing or potential future tax statute, the private party had a colorable basis for collecting the "tax." *Sigmon*, 110 F.3d at 1204; *Kaucky*, 109 F.3d at 352-3. This reasoning is completely incompatible with this Court's decisions in *Enochs* and *Miller v. Standard Nut Margarine Co. of Florida*, however.

In *Enochs*, this Court relied upon its prior decision in *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 52 S.Ct 260, 76 L.Ed. 422 (1932), in holding that a taxpayer can enjoin the IRS (or its collecting agent) from collecting a tax which could not possibly be valid. 82 S.Ct at 1128. In *Miller*, this Court allowed a taxpayer to enjoin the IRS from collecting a tax imposed by the Oleomargarine Act of 1886 on the taxpayer's vegetable oil product on the ground that there was no colorable basis for the IRS to claim that the taxpayer's vegetable oil product fell within the definition of oleomargarine contained in the Oleomargarine Act. 52 S.Ct at 263. *See also Enochs*, 82 S.Ct at 1128.

Under the standard used by the Fifth Circuit in *Sigmon* and the Seventh Circuit in *Kaucky*, this Court would have been compelled to hold in *Miller* that the IRS had a colorable basis for collecting the oleomargarine tax. The IRS met the first prong of their test because it was obviously duly authorized to collect some taxes from the taxpayer. It met the second prong of the test because it contended that it would be collecting the amounts in issue as taxes pursuant to the Oleomargarine Act of 1886, a valid, existing tax statute.

Nevertheless, because there was not even a colorable basis for the IRS to claim that the taxpayer's product fell within the valid tax statute in issue, this Court held that the IRS did not have a colorable basis for collecting the tax in issue. Thus, the Fifth and Seventh Circuits' application of the "no colorable basis" exception to Southwest's conduct in a manner completely inconsistent with *Enochs* and *Miller* cannot possibly be proper.

Applying the standard for determining whether there is a colorable basis for collecting a tax actually used by this Court in *Miller* to the facts of this case compels a conclusion diametrically opposed to that of the Fifth and Seventh Circuits. As both courts freely admitted, in 1995, neither § 4261 nor any other statute imposed a tax on 1996 air travel. *Sigmon*, 110 F.3d at 1203; *Kaucky*, 109 F.3d at 350. Thus, because there was not even an arguable basis that § 4261 or any other statute imposed an excise tax on 1996 travel, Southwest could not have had a colorable basis for collecting the amounts in issue as excise taxes in 1995.

An example makes even more clear the complete fallacy of the Fifth and Seventh Circuits' approach to colorable basis. The luxury tax on automobiles imposes an eight percent (8%) tax on the price of new cars in excess of $34,000. If an unscrupulous auto dealer decided to start collecting the tax on the full price of each car (including on $15,000 cars), the Fifth and Seventh Circuits would presumably hold that the auto dealer had a colorable basis for collecting the fictitious tax on the first $34,000 of a new car's price because the auto dealer would be an authorized private collecting agent for the IRS, and because there would be a tax statute pursuant to which the auto dealer claimed to collect the amounts in issue.

This Court's decision in *Miller* requires a different result. The auto dealer would not have a colorable basis for collecting the amounts in issue as taxes, because there is no possible way it or the IRS could ever prevail that it properly collected taxes on the portion of a new car's sale price that is less than $34,000. Under these circumstances, the IRS would have no conceivable claim to the funds justifying a

refund claim be made to it, and the auto dealer would not deserve the protection of § 7422, because it didn't conceivably act as a mere agent for the IRS.

In short, in order for there to be a colorable basis for collecting a tax, a private collector or the IRS must do more than point to a statute under which it claims to have collected the taxes. It must also have a colorable basis -- a possibly reasonable basis -- for claiming that the statute in issue could impose the purported tax on the affected taxpayers. Southwest clearly fails this test in this case.

The fact that Southwest may have anticipated that Congress and the President would enact such a statute at some point in the future cannot supply Southwest with a colorable basis for collecting a tax on 1996 travel. If it does, all bills in Congress which would impose a new tax would provide a reasonable basis for advance collection by the IRS and private collectors. That, quite obviously, cannot be the law.

In addition, the Fifth and Seventh Circuits' holding that Southwest's speculation that § 4261 would be renewed gave it a colorable basis for collecting the amounts in issue fails to recognize that Congress and the IRS previously addressed this exact situation in the context of excise taxes and rejected those courts' analysis. They did so by enacting a statute and regulations that provided that an excise tax on transportation which was not subject to the tax at the time the fare was collected could only be collected after the transportation subsequently became subject to an excise tax, and not at the time the fare was collected. *See* 26 U.S.C.A. § 4263(c) and (d) (West 1989); 26 C.F.R. § 49-4264(c) -1(a)(1) (1976).

In other words, Congress and the IRS specifically legislated that because travel in 1996 was not subject to an excise tax at the time the tickets in issue were sold by Southwest in 1995, Southwest was not obligated to, and had no right to, collect an excise tax on such travel, unless and until the travel became subject to an excise tax via Congress' and the President's renewal of § 4261. Given that Southwest acted directly contrary to a federal statute and regulations when it collected a non-existent "excise tax" in 1995 on tickets for travel in 1996, Southwest's speculation that the excise tax might be extended to 1996 travel cannot, as a matter of law, constitute a colorable basis for collecting the non-existent tax.

Congress even more emphatically demonstrated its intent and belief that amounts collected in 1995 as "taxes" on 1996 travel by Southwest and other airlines did not constitute taxes subject to § 7422 and the other provisions of the Internal Revenue Code by one of its most recent amendments to § 4261. *See* 26 U.S.C.A. § 4261(g) (West Pamphlet May, 1997). Specifically, in § 4261(g)(1)(A), Congress made travel taking place after the expiration of the tax subject to the tax if it is paid for prior to the expiration, and it further provided in § 4261(g)(2) that the tax paid under that provision would be treated as an overpayment subject to refund. In other words, Congress amended the statute and added additional language to create the exact situation that the Fifth and Seventh Circuits ruled already existed under the previous version of the statute that did not contain such language.

Why would Congress do that? Congress clearly understood, pursuant to its prior intent as expressed in § 4263(c) and (d), that when the airlines had collected

amounts in 1995 as "taxes" on 1996 travel, they had not collected a tax at all and that such funds were not subject to § 7422 of the Internal Revenue Code. To prevent that problem from reoccurring, Congress amended § 4261(g). Such action by Congress would not have been necessary had the Fifth and Seventh Circuits' holdings conceivably been correct.

III.

ALTERNATIVELY, THE FIFTH CIRCUIT ERRED IN HOLDING THAT 26 U.S.C. § 6415(c) DOES NOT PROVIDE SIGMON AND HASSLER A FEDERAL CAUSE OF ACTION AGAINST SOUTHWEST, IF NECESSARY

If this Court holds that Southwest had a colorable claim that it was obligated by law in 1995 to collect excise taxes on the 1996 travel of Sigmon and Hassler, then (and only then) Sigmon and Hassler will have a claim in the nature of a tax refund suit. In that case, Sigmon and Hassler will have standing to bring such a tax refund suit directly against Southwest pursuant to Section 6415(c) of the Internal Revenue Code.

Subsection (a) of § 6415 allows an airline, like Southwest, which collected the excise tax imposed by § 4261(a) to obtain from the IRS a credit for or a refund of any overpayment of such excise tax, if the airline establishes that it repaid the amount of such tax to its customer or that it obtained the consent of its customer to obtain such credit or refund. 26 U.S.C.A. § 6415(a) (West 1989). Subsection (b) gives an airline the right to take a credit for a refund of an overpayment on a subsequent tax return instead of filing a claim for refund with the IRS. 26 U.S.C.A. § 6415(b) (West 1989).

Subsection (c) reads as follows:

> *(c) Refund of overcollections - In case any person required under § 4251, **4261**, or 4271 to collect any tax shall make an overcollection of such tax, such person **shall**, upon proper application, refund such overcollection to the person entitled thereto.*

26 U.S.C.A. § 6415(c) (West 1989) (emphasis added).

The mechanism created by § 6415 is elegantly simple. Pursuant to Subsection (c), the air traveler from whom the excise tax on airline travel under § 4261(a) was overcollected may make proper application to the airline which collected the excise tax, and such airline **shall** refund such overcollection. Pursuant to Subsections (a) and (b), the airline then has the right to either apply for and receive a refund of the amount of the tax from the IRS or to merely take a credit for such amount on a subsequent excise tax return.

The intent and purpose of Congress in enacting § 6415(c) has been explained as follows:

> *The purpose of Section 6415 as a whole is apparently to provide mechanisms for lessening the burden of administering a tax which is imposed on a large number of taxpayers paying a relatively small amount of tax on each taxable transaction. It eliminates the necessity of individual taxpayers filing refund claims for each overpayment of an excise tax by allowing refunds to be made to the collecting agent for all its customers, and it lessens the number of refund claims required by allowing the collecting agent in certain cases to take a credit upon a subsequent return instead of filing a refund claim.*

DuPont Glore Forgan, Inc. v. American Tel. & Tel. Co. (AT&T), 428 F. Supp. 1297, 1302 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2nd Cir.), *cert. denied*, 439 U.S. 970 (1978).

The Fifth Circuit initially held that § 6415(c) might not apply to this sort of refund based upon a 1921 IRS regulation. 110 F.3d at 1205. Specifically, the Fifth Circuit thought that § 6415(c) might apply only to amounts overcollected as a result of some clerical or mechanical error and not to taxes illegally or erroneously collected. *Id.*

Section 6415(c) does not, however, on its face, restrict itself to overcollections due to mechanical or clerical errors. 26 U.S.C.A. § 6415(c) (West 1989). Section 6415(a), which allows an airline that overcollected an excise tax and refunded same to a customer to recover such an amount from the IRS by credit or refund, similarly contains no restriction based upon the reason for the refund to the customer. U.S.C.A. § 6415(a) (West 1989).

The currently applicable IRS regulations similarly do not purport to limit § 6415 to refunds made by airlines to customers due to mechanical or clerical errors. 26 C.F.R. § 301.6415-1 (1976); 26 C.F.R. §§ 29.0-1 to 49.04 and 49.4261 to 49.4264(f) (1976). Pursuant to 26 C.F.R. § 49.04 (1976), it appears these regulations supersede any prior regulations.

Furthermore, without objection by the IRS, Southwest routinely takes credits for refunds on subsequent months' tax returns regardless of the reason and without explanation. Indeed, the IRS wrote the airlines and told them to apply § 6415(c) in this exact situation. (App. at E-17 to E-19).

To the extent older IRS regulations still apply, they do not purport to restrict the application of the predecessor statute to § 6415 to refunds made by airlines only on account of mechanical or clerical errors. Rather, those regulations simply provide that airlines can recover by credit only refunds they made to customers on account of mechanical and clerical errors, while they can recover refunds made to customers of taxes collected erroneously or illegally by refund.[2] While IRS regulations from 1921 applicable to a 1918 predecessor statute did seem to limit the scope of the 1918 predecessor to § 6415 as argued by the Fifth Circuit, that version of the statute and those regulations were clearly superseded by the 1939 statute and the 1932 and 1942 regulations which do not so limit §6415.[3]

Significantly, whether Southwest would recover refunds made to members of the Class via credit or refund is irrelevant. Either way, the efficiency § 6415(c) seeks to achieve will be achieved. If credits are taken by Southwest, the burden on the IRS is obviously drastically reduced, as is the burden placed upon thousands and thousands of Class members. Similarly, if Southwest makes mass refund claims to the IRS

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[2] In the Appendix at D-8 to D-11 are the Internal Revenue Act of 1939 § 1715, Treasury Regulation 42, arts. 51 and 52 (1932) and Treasury Regulation 42 §§ 130.77 and 130.78 (1942). Pursuant to 26 C.F.R. § 42.0-4 (1967), to the extent they are not superseded, the 1942 regulations still control. (App. at D-12 to D-13.)

[3] In the Appendix at D-12 are the Internal Revenue Act of 1918 § 1310(a) and Treasury Regulation 43, § 1310(a) (1921). ***See*** 26 C.F.R. § 42.0-4 (1967), in the Appendix at D-12 to D-13, for the superseding effect of the 1942 regulations.

which include refunds to hundreds or thousands of Class members, the number of claims processed by the IRS will be dramatically decreased, as will the burden on all the members of the Class.

The Fifth Circuit next amazingly claimed that there is no rational basis for allowing certain excise taxpayers the right to demand refunds from and then sue private collectors while not granting the same right to all other taxpayers. 110 F.3d at 1205. This incredible assertion by the Fifth Circuit blatantly ignores Congress' purpose in enacting § 6415(c) and the fact that § 6415(c) quite clearly represents a conscious decision on the part of Congress to create an exception to the normal rule found in § 7422 for certain excise taxpayers.

The reason why Congress chose to allow suits against private collectors of certain excise taxes, but not against all private collectors of federal taxes, is actually quite obvious. As opposed to income and other taxes which typically are quite substantial, the amounts of such excise taxes are always quite small, $6.27 in the case of Sigmon. Congress realized that processing thousands or even millions of such small claims would place a substantial and unwarranted administrative burden upon the IRS and upon such excise taxpayers. Not desiring to place such a burden on the IRS and those excise taxpayers, Congress logically chose with § 6415(c) to allow persons who overpaid small amounts of excise taxes to compel the private collectors of such taxes to refund them and then to allow such collectors, in turn, to collectively and efficiently obtain refunds or credits from the IRS pursuant to the other subsections of § 6415.

Finally, the Fifth Circuit held that § 6415(c) does not meet the second and third of the following four

criteria established by this Court in *Cort v. Ash* for determining whether a cause of action may be implied for breach of a federal statute: (i) whether the statute creates a federal right or "especial benefit" for a class of which plaintiffs are members; (ii) whether there is any indication of legislative intent, explicit or implicit, to create a private cause of action; (iii) whether implying a private cause of action would be consistent with the purpose of the legislative scheme; and (iv) whether the cause of action urged by the plaintiff is one traditionally relegated to state law. 95 S.Ct at 2088.

As noted, the Fifth Circuit did not deny that § 6415(c) meets the first and fourth *Cort v. Ash* criteria. Section 6415(c) clearly meets the first criteria because it clearly creates a federal right in favor of a class of persons (persons from whom certain excise taxes were overcollected by private collectors), and Sigmon and Hassler are clearly members of that class. Section 6415(c) clearly meets the fourth element as well, because if this Court finds that this suit is in the nature of a suit for refund of improperly collected taxes, it will have found that this is not an area traditionally relegated to state law.

The Fifth Circuit did, however, deny that § 6415(c) meets the second *Cort v. Ash* criteria that there be some indication of legislative intent to create a private cause of action. 110 F.3d at 1205-6. The Fifth Circuit did so based upon a presumption that Congress did not intend to create a private right of action, and it held that Sigmon and Hassler bore the heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute. *Id.* at 1205.

This presumption made by the Fifth Circuit and the heavy burden it placed upon Sigmon and Hassler to overcome it directly conflict with the decisions of this Court. Initially, the Fifth Circuit's presumption clearly arises out of a hostility to implying causes of action into federal statutes. This hostility is completely at odds with the statement of this Court that:

> *...when that remedy [a private suit] is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.*

Cannon v. The University of Chicago, 99 S.Ct 1961.

Furthermore, the heavy burden placed upon Sigmon and Hassler by the Fifth Circuit to prove that Congress affirmatively contemplated private enforcement when it passed the relevant statute irrevocably conflicts with this Court's holding in *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct 513, 516, 98 L.Ed.2d 512 (1988), that the necessary focus on Congressional intent does not require evidence that members of the Congress, in enacting the statute, actually had in mind the creation of a private cause of action. As the implied cause of action doctrine suggests, and as this Court has recognized, the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. *Cannon v. The University of Chicago*, 99 S.Ct at 1956.

Accordingly, this Court has held that the Congressional intent to provide a private remedy will usually be implied from the language of the statute and/or its structure and/or in the circumstances of its enactment. *Thompson v. Thompson*, 108 S.Ct at 516. In

further direct contravention of this Court's holding in *Thompson* that Congressional intent should be implied from the statute's language, the Fifth Circuit held that the language of § 6415(c), specifically its use of the mandatory term *"shall,"* is not evidence of Congressional intent to create a private remedy. 110 F.3d at 1206. It held this because the term *"shall"* is not always mandatory. *Id.*

In so holding, the Fifth Circuit inexplicably ignored its very own and quite appropriate rules of statutory construction. That court, correctly, previously held that a court must construe a statute's language so as to give effect to the intent of Congress. *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977). It also correctly held that a court must accept the wording of the statute as the most persuasive evidence of that Congressional intent. *Id.* Accordingly, the Fifth Circuit correctly held that a court must interpret *"shall"* as mandatory, unless one party makes a convincing argument to the contrary. *Id.*

In this case, not only did Southwest and the Fifth Circuit fail to make a convincing argument that *"shall"* is not mandatory in § 6415(c), they failed to make **any** argument as to why that term is not mandatory. Accordingly, the usual statutory presumption should guide this Court's interpretation of *"shall,"* and it should hold that Congress used *"shall"* in § 6415(c) to make refunds by private collectors mandatory.

Furthermore, even if this Court engages in an analysis of whether assigning a mandatory or permissive meaning to *"shall"* in § 6415(c) is more consistent with the statute's intent, it should conclude that a mandatory interpretation best fulfills the manifest intent of Congress in enacting the statute. Quite obviously, this

Court will best implement Congress' intent to lessen the burden on the IRS and excise taxpayers of refunding numerous, very small overcollections of excise taxes by making it mandatory that collecting agents refund improperly collected excise taxes to their customers, upon proper application.

If private collecting agents have a choice, and if they uniformly elect not to make such refunds, they would entirely defeat Congress' purpose and intent in enacting § 6415(c). It requires a stretch of the imagination indeed to believe that Congress intended private tax collectors like Southwest to have the discretion to defeat its purpose in enacting 26 U.S.C. § 6415.

In addition to its use of the mandatory term *"shall,"* Congress indicated its intent to create a private remedy by specifically identifying a class of persons to receive a benefit. Indeed, this Court has noted that, with the exception of one case in which the relevant statute reflected a specific policy against judicial interference, it has **never** refused to imply a cause of action where the language of the statute explicitly conferred a benefit directly on a class of persons that included the plaintiff in the case. *Cannon v. The University of Chicago*, 99 S.Ct at 1954, n. 13.

Accordingly, this Court has held that where it is clear that federal law has granted a class of persons certain rights, *no other evidence* is necessary to show a Congressional intent to create a private cause of action, although an explicit purpose not to provide cause of action would be controlling. *Id.* at 1956. Because the Fifth Circuit did not deny that § 6415(c) conferred a benefit directly on a class of persons that included Sigmon and Hassler, its ruling that Sigmon and Hassler failed to prove Congressional intent to grant a private

remedy irrevocably conflicts with this Court's decision in *Cannon v. The University of Chicago.*

The Fifth Circuit also denied that § 6415(c) met the third *Cort v. Ash* criteria and held that implying a private cause of action under § 6415(c) would not be consistent with the purpose of the legislative scheme. 110 F.3d at 1206. Specifically, the Fifth Circuit held that implying a private cause of action into § 6415(c) would somehow conflict with the scheme of the Internal Revenue Code, which generally funnels all tax refund claims and suits through § 7422. This incredible statement by the Fifth Circuit simply ignores the purpose for which Congress enacted § 6415(c) and almost denies its very existence.

At an absolute minimum, § 6415(c) provides an exception, on an optional basis, to § 7422(a). Instead of filing a refund claim with the IRS pursuant to § 7422(a) in the first instance, a customer of Southwest may seek a refund of overcollected excise tax from Southwest, which Southwest may pay and then recoup from the IRS by credit or refund. The question for this Court then becomes whether Congress intended this exception to § 7422(a) found in § 6415(c) to be mandatory. If so, § 6415(c) must also constitute an exception to § 7422(f)(1) and allow suits directly against private collectors or there would be no remedy for the violation of the rights conferred in § 6415(c).

That Congress intended the rights granted to Sigmon, Hassler and the Class in § 6415(c) to be mandatory is manifest. First, as discussed previously, it used the mandatory term "*shall.*" Second, in order to insure that Congress' purpose in enacting § 6415 is realized, § 6415 must be interpreted as mandatory. If it is not mandatory, Southwest is given the option of

depriving taxpayers like Sigmon and Hassler and the IRS of the benefits of § 6415(c), thereby shifting from itself to taxpayers and the IRS the administrative costs of refunding amounts it illegally collected.

In other words, § 6415(c) is an integral part of Congress' scheme which must be given meaning and implemented consistent with Congressional intent by this Court. The absence of any other way to achieve the goals of § 6415(c) in the face of statutory disobedience, such as Southwest's disobedience in this case, strongly demonstrates a Congressional intent to create a private remedy.

At a fundamental level, this Court must decide whether to accept the Fifth Circuit refusing to imply a cause of action into § 6415(c), thereby emasculating that statute and giving discretion to Southwest and other airlines to render it ineffective, based upon a Fifth Circuit-created presumption against implying federal causes of action which irrevocably conflicts with the decisions of this Court. This Court should make it very clear to the Fifth Circuit that Congress should not be presumed to have passed teethless, unenforceable statutes and, accordingly, that it must imply causes of action where necessary to effectuate Congressional intent.

IV.

CONCLUSION

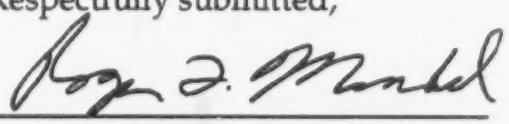
Only this Court has the power to deliver Sigmon and Hassler and millions of airline passengers from the gigantic "Catch 22" created by the Fifth Circuit. It should do so in order to resolve two very important questions of federal law that will inevitably arise many times in the future and which will affect thousands, if

not millions, of airline passengers and other excise taxpayers and the IRS in the future.

Sigmon and Hassler urge this Court to: (1) consider this case, (2) hold that Sigmon and Hassler do not assert a suit for a tax refund subject to the Internal Revenue Code, but rather state law causes of action, (3) reverse the summary judgment in favor of Southwest, and (4) remand this case back to the district court with instructions for it to remand the case back to state court.

Alternatively, if the Court finds that Sigmon and Hassler have asserted a suit in the nature of a tax refund suit, Sigmon and Hassler urge this Court to: (1) hold that they have asserted a cause of action pursuant to § 6415(c), (2) reverse the summary judgment in favor of Southwest, and (3) remand to the district court for further proceedings.

Respectfully submitted,



Roger L. Mandel, *Counsel of Record*
Marc R. Stanley
Stanley, Mandel & Iola, L.L.P.
3100 Monticello Avenue, Suite 750
Dallas, Texas 75205
(214) 443-4300 (Phone)
(214) 443-0358 (Fax)

Attorneys for Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL NO. 396-CV0393-H

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas.

(Decided April 28, 1997)

Before Duhé, Benavides and Stewart, *Circuit Judges.*

BENAVIDES, Circuit Judge:

This appeal requires us to determine whether airline passengers can bring suit against an airline to obtain refunds of amounts erroneously collected by the airline as federal excise taxes. We conclude that they cannot.

In late 1995, Ernesto Sigmon and William Hassler each purchased an airline ticket from Southwest Airlines Company ("Southwest") for travel in 1996. In addition to the ticket price, Southwest included a 10% charge on each ticket. Southwest added

the 10% charge to all tickets sold on or before December 31, 1995, including tickets for travel in 1996. Southwest charged this amount in expectation that Congress would renew a longstanding excise tax on domestic airline tickets.[1] See 26 U.S.C. § 4261.

Congress had repeatedly renewed the airline ticket excise tax provision at the eleventh hour. See Pub.L. No. 88-52, § 3(a)(3), 77 Stat. 72 (1963); Pub. L. No. 88-348, § 2(a)(3), 78 Stat. 237 (1964); Pub. L. No. 89-44, §303(a), 79 Stat. 136, 148 (1965); Pub. L. No. 100-223, § 402(a)(1), 101 Stat. 1486, 1532 (1987); Pub. L.

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[1] The parties entered into the following stipulation:

Throughout the period from July 1995 through January 1996, Southwest Airlines knew that the ten percent (10%) excise tax Southwest Airlines was required by 26 U.S.C. § 4261 to collect on tickets sold by Southwest Airlines for travel on or before December 31, 1995, had not been extended by Congress to apply to tickets sold for travel on or after January 1, 1996, and that no statute in force at any time in 1995 required an excise tax to be collected on tickets sold by Southwest Airlines for travel on or after January 1, 1996. Nevertheless, based on Southwest Airlines' expectation throughout the second half of 1995 that Congress and the President would extend the application of 26 U.S.C. § 4261 or otherwise enact a statute requiring the collection of a ten percent (10%) excise tax on tickets sold by Southwest Airlines for travel on or after January 1, 1996, Southwest Airlines collected from customers who purchased tickets in 1995 for travel on or after January 1, 1996, an amount equal to the ten percent (10%) excise tax that Southwest Airlines was required by 26 U.S.C. § 4261 to collect on tickets sold by Southwest Airlines for travel on or before December 31, 1995.

No. 101-508, § 11213(d)(1), 104 Stat. 1388-435 (1990). Southwest's expectation that the tax once again would be renewed was disappointed when President Clinton vetoed the bill containing the airline ticket excise tax. The tax expired on December 31, 1995. Although Congress reenacted the tax nearly nine months later, the tax was not given retroactive application. Pub. L. No. 104-188, § 1609(b), 110 Stat. 1755, 1841(1996).[2]

When the excise tax provision expired at the end of 1995, Southwest had already collected the tax on tickets sold during 1995 for travel during 1996. Ultimately, the taxes collected on these tickets, including those purchased by putative class representatives Sigmon and Hassler,[3] were not owed; the excise tax provision in effect in 1995 imposed the tax based on the date of travel rather than the date of purchase.[4] The total amount of erroneously collected excise taxes at issue is unclear; Southwest remitted approximately $18 million to the IRS in January of 1996 for all excise taxes collected during December of 1995.

Sigmon and Hassler allege that they requested refunds from Southwest and that Southwest denied their requests. They brought a class action suit in state

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[2] The tax expired again on December 31, 1996, and was reenacted on February 28, 1997. Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4 (1997).

[3] The case was dismissed before any class was certified.

[4] When Congress reenacted the tax in February of 1997, it solved the dilemma faced by Southwest and other airlines in 1995 as a result of the previous lapse. Congress added Section 4261(g)(1)(B), which applies the excise tax to tickets purchased before the expiration of the tax for transportation beginning after the expiration date. Pub. L. No. 105-2, § 2(b)(l), 111 Stat. 4 (1997).

court, alleging common-law causes of action for fraud, "for money had and received," and for conversion. Southwest removed the suit to federal district court. Sigmon and Hassler did not move to remand the case to state court. In addition to actual damages, they seek attorneys' fees and costs, exemplary damages, and pre- and post-judgment interest.

Shortly after removal, Southwest filed a motion to dismiss the plaintiffs' complaint. In response, plaintiffs moved for leave to amend their complaint; the district court granted the motion. The plaintiffs' amended complaint asserted an implied cause of action under 26 U.S.C. § 6415(c) and alleged that Southwest had failed to remit to the IRS the amounts collected as excise taxes.[5] After plaintiffs filed their amended

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[5] Although the parties fought long and hard in the district court about whether Southwest actually remitted the collected amounts to the IRS, the appellants do not pursue this line of argument on appeal. Rather, they argue that regardless of whether the collected funds were remitted to the IRS, Southwest is not entitled to protection from suit under the Internal Revenue Code. Even if appellants had raised the issue, however, it appears that Southwest did remit the taxes it collected, although it took credits and deductions against those amounts and remitted its net tax liability. In support of its motion for summary judgment, Southwest submitted the affidavit of Rhonda Heatley, Southwest's Senior Tax Accountant, who swore that "all excise tax proceeds collected by Southwest Airlines Company on or prior to December 31, 1995 have been remitted to the United States government" and that "Southwest Airlines Company no longer has possession or control of any such monies."

complaint, Southwest moved to have its motion to dismiss be treated as a motion for summary judgment. The district court granted Southwest's motion and allowed the parties to submit summary judgment evidence.

On May 23, 1996, the district court granted summary judgment in favor of Southwest on three grounds: (1) the Internal Revenue Code, 26 U.S.C. § 7422, preempts the plaintiffs' claims; (2) the Airline Deregulation Act, 49 U.S.C. § 41713, preempts the plaintiffs' claims; and (3) 26 U.S.C. § 6415 does not create an implied cause of action in favor of the plaintiffs.

I.

On appeal, Sigmon and Hassler assert that the district court lacked subject-matter jurisdiction because they asserted only state common-law causes of action against Southwest Airlines in their state court petition. Southwest Airlines removed to federal court on the ground that plaintiffs stated federal claims under 26 U.S.C. §§ 4261 and 6415. The plaintiffs' state-court petition cites 26 U.S.C. § 6415(c), which they now claim provides them with an implied federal cause of action. We need not decide whether the reference to Section 6415(c) in the state-court petition is sufficient to create a federal question, because plaintiffs' amended federal complaint clearly states an implied cause of action under 26 U.S.C. § 6415(c). This claim constitutes a federal question and thus gives the district court original jurisdiction under 28 U.S.C. § 1331.

Although subject-matter jurisdiction is generally assessed as of the time of removal, there is an exception if the plaintiff voluntarily amends his or her complaint

after removal to add a federal cause of action, and the case is "tried on the merits without objection." See *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 547 (5th Cir. 1990).[6] In this case, the district court acquired jurisdiction, if it did not already exist, when the plaintiffs amended their federal complaint to include an implied cause of action under federal law. See id. at 546 ("[A]lthough [plaintiff's] initial complaint was not removable, [plaintiff's] decision to 'throw in the towel' and amend his complaint to state an 'unmistakeable federal cause of action' conferred original jurisdiction on the federal court.") (quoting *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984)).

The district court had discretion to exercise supplemental jurisdiction over plaintiffs' pendent state-law claims. 28 U.S.C. § 1367(a), (c)(3); see also *Cinel v. Connick*, 15 F.3d 1338, 1344 (5th Cir.), *cert. denied*, 513 U.S. 868, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994). The district court's decision to retain jurisdiction in this case was far from an abuse of discretion, especially given that the court disposed of the plaintiffs' pendent state-law claims based on federal preemption. *Cf. Statland v. American Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir.) (after affirming the district court's conclusion that the Federal Aviation Act did not create an implied cause of action in favor of plaintiffs, the court of appeals exercised supplemental jurisdiction to dispose of plaintiffs' remaining state-law claims based on federal preemption), *cert. denied*, 510 U.S. 1012, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993).

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[6] Summary judgment is equivalent to a trial on the merits for the purpose of this rule. Id. at 546 (citations omitted).

II.

The Internal Revenue Code governs tax refund suits. Under Section 7422(a) of the Code, a taxpayer[7] who seeks a refund of federal taxes must first make an administrative refund claim with the Secretary of the Treasury. "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected...until a claim for refund or credit has been duly filed with the Secretary..." 26 U.S.C. § 7422(a). Failing an administrative resolution, the taxpayer's remedy is to file suit against the government. 26 U.S.C. § 7422(f)(l) ("A suit [for erroneously or illegally assessed or collected taxes] may be maintained only against the United States....") (emphasis added); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 365, 370 (7th Cir. 1997) ("Money collected in error by a lawful agent, public or private, of the [IRS] can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.").

Southwest acts as the government's agent in collecting airline ticket excise taxes. 26 U.S.C. § 4291; *see also Kaucky*, 109 F.3d at 351-52. Section 7422 protects from lawsuits private entities, like Southwest, that are required by statute to collect taxes for the government under threat of criminal penalty for failure to do so. *DuPont Glore Forgan Inc. v. AT&T*, 428 F.Supp. 1297, 1306 (S.D.N.Y.1977), aff'd, 578 F.2d 1366 (2d Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 465, 58 L.Ed.2d 431 (1978).[8]

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[7] Airline ticket purchasers, not airlines, are the taxpayers of the airline ticket excise tax. See 26 U.S.C. § 4261(d).

[8] Other courts in other contexts have likewise held that

Although appellants seek the return of amounts collected by Southwest to pay anticipated excise taxes, they argue that the Internal Revenue Code's refund scheme does not apply. The amounts collected, they argue, were not "taxes" because the excise tax statute was not reenacted. It is literally true that the amounts collected ultimately were not taxes. For the reasons that follow, however, "we do not think the literal sense is the right sense." *Kaucky*, 109 F.3d at 351.

Appellants advance two hypotheticals in support of their position. Suppose, they posit, a law firm added a 10% surcharge to its fees and called it a "federal excise tax," when no such tax existed. Or what if an airline dreamed up a 5% "carry on luggage tax"? The government would have no interest in the collected funds because they are not really "taxes." The culpable tax collectors would not deserve the protection of Section 7422 because they were not really acting as agents for the government. Southwest, they argue, is no different from their hypothetical tax collectors.

Unlike the defendants in these hypotheticals, however, Southwest was not imposing a make-believe tax, nor did it dream up a surcharge and pocket the money for itself. Southwest was collecting an excise tax that has been part of the airline passenger ticket sales landscape for nearly four decades. Here, it was

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if taxpayers seek to compel a refund, they must proceed against the United States rather than against a private tax collector. *See, e.g., Burda v. M. Ecker Co.*, 954 F.2d 434, 439 (7th Cir. 1992) (employment tax); *Econ Inc. v. Illinois Bell Tel. Co.*, 351 F.Supp. 1087, 1089 (N.D. Ill. 1972) (communications excise tax); *see also Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988).

stipulated that Southwest "expect[edl throughout the second half of 1995 that Congress and the President would extend the application of 26 U.S.C. § 4261 or otherwise enact a statute requiring the collection of a ten percent (10%) excise tax on tickets sold by Southwest Airlines for travel on or after January 1, 1996." Thus, Southwest was acting as an agent of the government in collecting a tax that it had every expectation would be reenacted, as it had been on several previous occasions. See *Kaucky*, 109 F.3d at 352.

Citing *Enochs v. Williams Packing & Navigation Co.*, appellants contend that, Section 7422 notwithstanding, they may sue Southwest because Southwest lacked a "colorable basis" for collecting the anticipated excise tax. 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). The Supreme Court in *Enochs* acknowledged a limited exception to 26 U.S.C. § 7421, which prohibits the courts from issuing injunctions against the collection of taxes. *See Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed 422 (1932). Under the *Enochs* exception, a taxpayer can obtain an injunction against the collection of taxes if it is "clear that under no circumstances could the Government ultimately prevail..." and equity jurisdiction otherwise exists. *Enochs*, 370 U.S. at 6-7, 82 S.Ct. at 1128-29. The *Enochs* exception, however, has never been applied to allow a taxpayer to sue a private tax collector for the refund of erroneously collected taxes.[9] We need not decide whether the *Enochs*

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[9] To allow an exception to Section 7422 based on a lack of a colorable basis, especially if evaluated at the time suit is filed, would open Pandora's box. Plaintiffs, in search of common-law damages in addition to a tax refund, would have strong incentives to attempt to

exception loosens the strictures of Section 7422; *Enochs* is not satisfied in this case because Southwest was acting with colorable authority when it collected the tax. *See Kaucky*, 109 F.3d at 352. Appellants argue that "[n]either the IRS nor Southwest Airlines could conceivably prove that Southwest Airlines properly collected the 'excise taxes' in issue." Although it is now apparent that passengers who paid the excise tax in 1995 for travel in 1996 are entitled to a refund from the IRS, that ex-post knowledge does not establish that Southwest lacked a colorable basis for collecting the tax. The issue is whether Southwest had a colorable basis to collect the tax at the time.

Although the collection may ultimately have been erroneous, the Internal Revenue Code provides the exclusive remedy for the erroneous or illegal collection of taxes: The taxpayer may file an administrative claim for a refund with the IRS. If the IRS does not return the erroneously or illegally collected tax, the taxpayer may then resort to the courts. But under Section 7422, the proper defendant in such a suit is the United States, not Southwest. The exclusive remedy provided by the Internal Revenue Code thus preempts the appellants' state-law claims against a private entity.[10]

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bypass the normal administrative tax refund process. Such an exception would allow taxpayers to seek a judicial resolution of whether a collected tax was colorable before challenging the tax through the administrative process provided by the IRS.

[10]Because we conclude that appellants' claims are precluded by 26 U.S.C. § 7422, we need not determine the propriety of the district court's conclusion that these claims are preempted by the Airline Deregulation Act.

III.

Appellants also ask this court to hold that 26 U.S.C. § 6415(c) creates a private cause of action for the return of the erroneously collected amounts. That section provides that if a private collector of excise taxes "make[s] an overcollection of such tax, such person shall, upon proper application, refund such overcollection to the person entitled thereto." 26 U.S.C. § 6415(c). Appellants claim that the plain language of this statute creates a federal right for their benefit, which they are entitled to enforce in a private cause of action in state or federal court against Southwest. We disagree.

As an initial matter, Section 6415(c) may not even apply to the sort of refund sought by the appellants in this case. *See Kaucky*, 109 F.3d at 353 (*citing AT & T*, 428 F.Supp. at 1304-05 and *Lehman v. USAIR Group, Inc.*, 930 F.Supp. 912, 915 (S.D.N.Y. 1996)). Section 6415(c) on its face is limited to "overcollection" of excise taxes, which has historically been distinguished from "illegal" or "erroneous" collection under Section 7422. Early Treasury regulations explained that "overcollection" referred only to cases in which "an excess amount [was] collected or paid" "as a result of some clerical or mechanical error." *See* Treas. Reg. 43, art. 65 (1921). The traditional distinction between taxes collected as the result of a mechanical or clerical error and taxes collected because of an error of law makes sense. The IRS has no interest in taxes collected purely as a result of mechanical or clerical error and hence need not be involved in the refund decision. If excise taxes are collected as the result of a legal error, however, the IRS's interest in being involved in the refund decision

is apparent. In the case of a legal error, the private tax collector would also risk being unable to recover the amounts refunded if the IRS determined the amount in fact was owed. *See AT&T*, 428 F.Supp. at 1306.

Of course, in this case, there is no dispute that the taxes were not ultimately owed. But if Section 6415(c) creates a right of action and applies to collections due to an error of law, as the appellants suggest, there is no principle by which the right would be limited to cases in which the tax was clearly not owed. Under appellants' interpretation, Section 6415(c) would allow any taxpayer to challenge any excise tax in court without first complaining to the IRS. If, for example, the appellants alleged that Southwest had misinterpreted the statute and as a result collected taxes erroneously, nothing would prevent them from seeking a refund in court before seeking an administrative resolution through the IRS. No rational basis exists for giving excise taxpayers special access to the courts that is denied all other taxpayers under Section 7422. *See AT & T*, 428 F.Supp. at 1304.

Even if Section 6415(c) does apply in this case, it does not create a private right of action enforceable in federal district court. No court appears to have recognized an implied private cause of action under Section 6415(c), and with good reason. *See Kaucky*, 109 F.3d at 353; *AT & T*, 428 F.Supp. at 1305; *Lehman*, 930 F.Supp. at 915. In evaluating whether a federal statute creates an implied cause of action, this circuit has applied the four factors set forth by the Supreme Court in *Cort v. Ash*: (1) whether the statute creates a federal right or "especial benefit" for a class of which plaintiffs are members; (2) whether there is any indication of legislative intent, explicit or implicit, to create a private cause

of action; (3) whether implying a private cause of action would be consistent with the purpose of the legislative scheme; and (4) whether the cause of action urged by the plaintiff is one traditionally relegated to state law. 422 U.S. 66, 78-79, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). In *Touche Ross & Co. v. Redington*, the Supreme Court explained that congressional intent is the touchstone for determining whether a federal statute creates a private right of action. 442 U.S. 560, 578, 99 S.Ct. 2479, 2490, 61 L.Ed.2d 82 (1979); *See also Louisiana Landmarks Soc'y, Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir. 1996) (citations omitted). This circuit has recognized a "presumption that Congress did not intend to create a private right of action." *Louisiana Landmarks*, 85 F.3d at 1123 (citation and internal quotation marks omitted). Appellants "bear[ ] the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute." Id. (citations and internal quotation marks omitted) They have not met that burden.

Nothing indicates that Congress intended Section 6415(c) to create an exception to Section 7422 that would allow excise taxpayers to seek relief from the courts in the first instance. Congress's failure even to hint that it intended to allow excise taxpayers to sue private tax collectors directly for refunds, combined with Section 7422's express bar on tax refund suits against a defendant other than the United States, compels the conclusion that Congress did not intend to provide a private remedy. *See Kaucky*, 109 F.3d at 353 ("[There is ... no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization.").

The third *Cort v. Ash* factor is particularly salient on the issue of congressional intent. The structure of the Internal Revenue Code shows that Congress intended the courts to play a role only after the IRS has been given an opportunity to resolve the taxpayer's claims. We have held that the "existence of [an] administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive." *Till v. Unifirst Federal Sav. & Loan Ass'n*, 653 F.2d 152, 160 (5th Cir.1981). "Indeed, it is clear under the maxim -- *expressio unius est exclusio alterius* -- that a pervasive remedial scheme provided by Congress is an indication there was no intent to provide an additional private remedy." Id.

Section 6415(c) is part of a scheme set up by Congress by which taxpayers can obtain refunds from the IRS. *See AT & T*, 428 F.Supp. at 1305 ("[T]he overall structure of the refund provisions of the Code negates plaintiffs' efforts to seek a tax refund from defendants."). To recognize a private cause of action against a nongovernmental tax collector under Section 6415(c) would be inconsistent with that scheme.

Appellants rely heavily on the word "shall" in 26 U.S.C. 6415(c), which provides that a private tax collector "shall, upon proper application, refund such overcollection to the person entitled thereto." They argue that "shall" is a mandatory rather than a permissive term and that this fact alone indicates that Congress intended to make refunds by private tax collecting agents mandatory. But courts do not always construe "shall" as mandatory. *See, e.g., Board of Governors of the Federal Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 1001 (5th Cir.1994), *cert. dismissed*, 513 U.S. 1140, 115 S.Ct. 1085, 130 L.Ed.2d 1055 (1995). Moreover, we

are especially reluctant to infer a private cause of action from Congress's use of "shall" in Section 6415(c) when another component of the legislative scheme, Section 7422, indicates that an aggrieved taxpayer's remedy lies solely in a proceeding against the United States. *See* 3 NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 57.06, at 20 (5th ed. 1992) ("[If] the particular provision in question is a part of a general legislative scheme, a consideration of the entire scheme together may make the particular provision clear. If the construction, mandatory or directory, would produce conflict with other statutes, the opposite ruling would ordinarily be adopted.").

Other than their heavy reliance on the statute's use of the phrase "shall ... refund," appellants merely point to the absence of evidence that Congress did not intend to create a private right of action. This is insufficient to overcome this circuit's presumption against implying causes of action.

IV.

Holding that appellants' state-law claims are precluded by Section 7422 does not leave consumers at the mercy of the airlines. Consumers can seek a refund of any erroneously collected excise taxes from the IRS. We recognize that this may inconvenience taxpayers. As a practical matter, however, many taxpayers would have been far more inconvenienced if Southwest had failed to collect the tax and it had been renewed as expected, especially those taxpayers who learned about their tax deficiencies at the departure gate.

Federal law provides an additional protection to consumers. The Airline Deregulation Act gives the Secretary of Transportation authority to investigate an

airline's unfair or deceptive acts or practices or unfair methods of competition. See 49 U.S.C. § 41713. Upon discovering such an act or practice, the Secretary may issue cease-and-desist orders or levy civil sanctions against an offending airline. *Id.*; *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 n. 4, 115 S.Ct. 817, 823 n. 4, 130 L.Ed.2d 715 (1995) (citations omitted). We do not suggest that such an action would be appropriate against Southwest in this case, only that the law provides another protection against the airlines engaging in the mischief prophesied by the appellants.

For the foregoing reasons, the summary judgment of the district court is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL NO. 396-CV0393-H

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas.

(Filed June 10, 1997)

JUDGMENT

Before Duhé, Benavides and Stewart, *Circuit Judges.*

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 05 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, Individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
	§	CIVIL NO.
	§	396-CV0393-H
v.	§	
SOUTHWEST AIRLINES CO.,	§	
Defendant.	§	

ORDER

On May 23, 1996, the Court heard argument on Defendant's Motion for Summary Judgment, filed February 15, 1996, and pleadings related thereto.[1]

After considering the pleadings, the relevant authorities, and the argument and representations of counsel, the Court was of the opinion, for reasons stated in open court, that Defendant's Motion for Summary Judgment should be, and it was GRANTED. Judgment will be entered accordingly.

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[1] The Motion was originally filed as a Motion to Dismiss but was converted to a Motion for Summary Judgment. *See* Order filed April 25, 1996.

SO ORDERED.

DATED: May 23, 1996.

THE HONORABLE BAREFOOT SANDERS,
JUDGE, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, Individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
	§	CIVIL NO.
	§	396-CV0393-H
v.	§	
SOUTHWEST AIRLINES CO.,	§	
Defendant.	§	

JUDGMENT

This Judgment is entered pursuant to the Court's Order filed May 23, 1996, granting Defendant's Motion for Summary Judgment.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs take nothing by their suit against Defendant Southwest Airlines, Co., and that this suit be, and it is hereby, DISMISSED on the merits at Plaintiffs' cost.

SIGNED this 23rd day of May, 1996.

THE HONORABLE BAREFOOT SANDERS,
JUDGE, UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL NO. 396-CV0393-H

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas.

ON PETITION FOR REHEARING

(Filed May 28, 1996)

Before Duhé, Benavides and Stewart, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

26 U.S.C.A. § 6415
(West 1989)
Credits or Refunds to Persons
Who Collected Certain Taxes

(a) **Allowance of credits or refunds.** -- Credit or refund of any overpayment of tax imposed by section 4251, 4261 or 4271 may be allowed to the person who collected the tax and paid it to the Secretary if such person establishes, under such regulations as the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.

(b) **Credit on returns.** -- Any person entitled to a refund of tax imposed by section 4251, 4261 or 4271 paid, or collected and paid, to the Secretary by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.

(c) **Refund of overcollections.** -- In case any person required under section 4251, 4261 or 4271 to collect any tax shall make an overcollection of such tax, such person shall, upon proper application, refund such overcollection to the person entitled thereto.

(d) **Refund of taxable payment.** -- Any person making a refund of any payment on which tax imposed by section 4251, 4261 or 4271 has been collected may repay therewith the amount of tax collected on such payment.

26 U.S.C.A. § 7421
(West 1989)
Prohibition of Suits to
Restrain Assessment or Collection

(a) **Tax.** – Except as provided in sections 6212(a) and (c), 6213(b), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * *

26 U.S.C.A. § 7422
(West Supp. 1997)
Civil Actions for Refund

(a) **No suit prior to filing claim for refund.** – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * *

(f) **Limitation on right of action for refund.** –

(1) **General rule.** – A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the

United States (or former officer or employee) or his personal representative.

* * *

26 U.S.C.A. § 4263
(West 1989)
Special Rules

* * *

(c) **Payment of tax.** -- Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, under regulations prescribed by the Secretary, to the extent that such tax is not collected under any other provision of this subchapter --

(1) such tax shall be paid by the person paying for the transportation or by the person using the transportation;

(2) such tax shall be paid within such time as the Secretary shall prescribe by regulations after whichever of the following first occurs:

(A) the rights to the transportation expire; or

(B) the time when the transportation becomes subject to tax; and

(3) payment of such tax shall be made to the Secretary, to the person to whom the payment for transportation was made, or, in the case of transportation other than transportation described in section 4262(a)(1), to any person furnishing any portion of such transportation.

(d) **Application of tax** -- The tax imposed by section 4261 shall apply to any amount paid within the United States for transportation of any person by air unless the taxpayer establishes, pursuant to regulations prescribed by the Secretary, at the time of payment for the transportation, that the transportation is not transportation in respect of which tax is imposed by section 4261.

* * *

26 U.S.C.A. § 4261
(West Supp. 1996)
Imposition of Tax

(a) **In general.** -- There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 10 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

* * *

(g) **Termination.** -- The taxes imposed by this section shall apply with respect to transportation beginning after August 31, 1982, and before January 1, 1996.

26 U.S.C.A. § 4261
(West Supp. 1997)
Imposition of Tax

* * *

(g) **Termination.** -- The taxes imposed by this section shall apply with respect to transportation

beginning after August 31, 1982, and before January 1, 1996, and to transportation beginning on or after the date which is 7 calendar days after the date of the enactment of the Small Business Job Protection Act of 1996 and before January 1, 1997.

26 U.S.C.A. § 4261
(West Pamphlet May, 1997)
Imposition of Tax

* * *

(g) **Application of Taxes. --**

(1) **In general.** -- The taxes imposed by this section shall apply to --

(A) transportation beginning during the period --

(i) beginning on the 7th day after the date of the enactment of the Airport and Airway Trust Fund Tax Reinstatement Act of 1997, and

(ii) ending on September 30, 1997, and

(B) amounts paid during such period for transportation beginning after such period.

(2) **Refunds** -- If, as of the date any transportation begins, the taxes imposed by this section would not have applied to such transportation if paid for on such date, any tax paid under paragraph (1)(B) with respect to such transportation shall be treated as an overpayment.

PL 105-34, 1997 H 2014, 111 Stat. 788

Subtitle D -- Excise and Employment Tax Provisions

SEC. 1031. EXTENSION AND MODIFICATION OF TAXES FUNDING AIRPORT AND AIRWAY TRUST FUND; INCREASED DEPOSITS INTO SUCH FUND.

* * *

(b) **TICKET TAXES. --**

(1) **PERSONS** -- Clause (ii) of section 4261(g)(1)(A) is amended by striking "September 30, 1997" and inserting "September 30, 2007."

* * *

(e) **EFFECTIVE DATES. --**

(2) **TICKET TAXES. --**

(A) **IN GENERAL.** -- Except as otherwise provided in this paragraph, the amendments made by subsections (b) and (c) shall apply to transportation beginning on or after October 1, 1997.

(B) **TREATMENT OF AMOUNTS PAID FOR TICKETS PURCHASED BEFORE OCTOBER 1, 1997.** -- The amendments made by subsection (c) shall not apply to amounts paid before October 1, 1997; except that --

(i) the amendment made to section 4261(c) of the Internal Revenue Code of 1986 shall apply

to amounts paid more than 7 days after the date of the enactment of this Act for transportation beginning on or after October 1, 1997, and

(ii) the amendment made to section 4263(c) of such Code shall apply to the extent related to taxes imposed under the amendment made to such section 4261(c) on the amounts described in clause (i).

* * *

26 C.F.R. § 49.4264(c) - 1
Special Rule for the Payment of Tax.

(a) *Rule* -- (1) *In general.* Except as provided in subparagraph (2) of this paragraph, when any tax imposed by section 4261 is not paid at the time payment for the transportation is made, then to the extent that such tax is not collected under any other provision of law, such tax shall be paid by the person paying for the transportation or by the person using the transportation. The provisions of section 4264(c) apply where the amount paid for transportation is (i) subject to tax at the time such payment is made, but no tax is paid at the time, or (ii) not subject to tax at the time such payment is made, but because of some subsequent event the payment becomes subject to tax. The payment of tax shall be made to the district director of internal revenue for the district in which the taxpayer resides, or to the person from whom the transportation was purchased, within 30 days after whichever of the following first occurs: (a) The rights to the transport-

ation expire, or (b) the transportation becomes subject to tax. Such payment shall be accompanied with an explanation that it is being made in accordance with section 4264(c).

* * *

26 C.F.R. § 49.4261-4
Payments Made Within the United States;
Evidence of Nontaxability.

(a) *Presumption of taxability.* The tax imposed by section 4261(a) shall apply to any amount paid within the United States for the transportation of any person, unless the taxpayer establishes in accordance with the provisions of this section that at the time of payment the transportation is not transportation in respect of which tax is imposed by section 4261(a) (see section 4264(d)).

* * *

Internal Revenue Act of 1939
Sec. 1715
Payment of Tax

(d) **Excess Payments. --**

(1) Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent return.

(2) In the case of any overpayment or overcollection of any tax imposed by this chapter, the person making such overpayment or overcollection may take credit therefor against taxes due upon any

return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto.

* * *

Treasury Regulation 42 (1932)

Art. 51. Credits. – Every person required by the Act to collect tax, who overcollects and overpays, or who overpays from his own funds, any tax with one monthly return may, in cases where the overpayment was the result of some clerical, mechanical, or like error, take a credit for such overpayments against the tax due under any subsequent monthly return.

Art. 52. Refunds. – There are two classes of cases in which claims for refund may be considered, namely, (1) those in which a credit may be taken as provided in article 51 and (2) those in which erroneous or illegal payments of tax have been made, as distinguished from overpayments resulting from clerical, mechanical, or like errors. In cases falling within class (1) the principles applicable to the allowance of the credit (see art. 51) apply likewise to the allowance of refunds.

Where a collecting agency has erroneously or illegally overpaid from his own funds any tax, the collecting agency may be granted a refund. In case a collecting agency has erroneously or illegally over-collected and overpaid any tax due, a refund may be granted to the collecting agency, but only if it is established (1) that the tax so overcollected and overpaid has been returned to the person from whom collected or (2) that the collecting agency has obtained the consent of such person to the granting of the refund.

If the taxpayer files a claim for refund in his own name, he must attach thereto the original receipts issued by the collecting agency showing payment of the tax involved and a sworn statement of the facts on which the claim for refund is based.

A claim for refund should be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was paid. The affidavit on Form 843 must submit: (1) in the case of a taxpayer claiming refund of amounts overpaid to a collecting agency, that no repayment of the tax alleged to have been overpaid, or any part thereof, has been made to him by the collecting agency, and that he has not consented to the allowance of credit or refund to the collecting agency, and (2) in the case of the collecting agency, that no credits have been taken for the alleged overpayment in the manner provided for in article 51.

* * *

Treasury Regulation 42 (1942)

Sec. 130.77 Credits. -- Every person required to pay tax, or collect and pay tax, who overpays from his own funds, tax on any monthly return may, in cases where the overpayment was the result of a clerical or mechanical error, take credit for such overpayment against the tax due on a subsequent monthly return.

* * *

Sec. 130.78 Abatement or Refund of Erroneous or Illegal Assessments or Collections. -- A claim for abatement or refund of taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) shall

be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See section 3313 of the Code.)

Where a collecting agency has erroneously or illegally overpaid from its own funds any tax, the collecting agency may claim a refund of such overpayments. In case a collecting agency has erroneously or illegally overcollected and overpaid any tax due, the collecting agency may claim a refund of the amount so overcollected and overpaid, but only if it is established by affidavit or otherwise as may be required (a) that the tax so overcollected and overpaid has been returned to the person from whom collected, or that the collecting agency has obtained the written consent of such person to the granting of the refund and (b) that no credits have been taken for the alleged overpayment in the manner provided for in section 130.77.

If a person who has paid tax to a collecting agency files a claim for refund in his own name, there should be attached to the claim the original receipts issued by the collecting agency showing payment of the tax involved and a sworn statement of the facts on which the claim for refund is based, and the affidavit on Form 843 must show that no repayment of the tax alleged to have been overpaid or any part thereof has been made to the claimant by the collecting agency and that he has not consented to the allowance of credit or refund to the collecting agency.

Internal Revenue Act of 1918
40 Stat. 1057

Sec. 1310. -- (a) That in the case of any overpayment or overcollection of any tax imposed by section 628 or 630 or by Title V, Title VIII, or Title IX, the person making such overpayment or overcollection may take credit therefor against taxes due upon any monthly return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto.

* * *

Treasury Regulation 43 (1921)

Sec. 1310. (a) That in the case of any overpayment or overcollection of any tax imposed by . . . Title VIII [which includes sections 800 and 802] . . . the person making such overpayment or overcollection may take credit therefor against taxes due upon any monthly return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto.

* * *

26 C.F.R. § 42.04

Extent to which the regulations in this part supersede prior regulations.

The regulations in this part, with respect to the subject matter within the scope thereof, supersede the following regulations and such regulations as prescribed and made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, 19 F., R. 5167, Aug. 17, 1954. . .

. . . and transportation of persons -- Regulations 42 (1942 edition, as amended), 26 CFR (1939) Part 130.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNESTO D. SIGMON and WILLIAM GREGORY HASSLER, Individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
	§	CIVIL NO.
	§	396-CV0393-H
v.	§	
SOUTHWEST AIRLINES CO.,	§	
Defendant.	§	

(Filed May 21, 1996)

STIPULATION

COME NOW Plaintiffs Ernesto D. Sigmon and William Gregory Hassler and Defendant Southwest Airlines Co. and respectfully submit the following stipulation:

1. Throughout the period from July 1995 through January 1996, Southwest Airlines knew that the ten percent (10%) excise tax Southwest Airlines was required by 26 U.S.C. § 4261 to collect on tickets sold by Southwest Airlines for travel on or before December 31, 1995, had not been extended by Congress to apply to tickets sold for travel on or after January 1, 1996, and that no statute in force at any time in 1995 required an

excise tax to be collected on tickets sold by Southwest Airlines for travel on or after January 1, 1996. Nevertheless, based on Southwest Airlines' expectation throughout the second half of 1995 that Congress and the President would extend the application of 26 U.S.C. § 4261 or otherwise enact a statute requiring the collection of a ten percent (10%) excise tax on tickets sold by Southwest Airlines for travel on or after January 1, 1996, Southwest Airlines collected from customers who purchased tickets in 1995 for travel on or after January 1, 1996, an amount equal to the ten percent (10%) excise tax that Southwest Airlines was required by 26 U.S.C. § 4261 to collect on tickets sold by Southwest Airlines for travel on or before December 31, 1995.

* * *

3. Southwest Airlines was told of the pendency of this action on January 5, 1996, received a copy of Plaintiffs' Original Class Action Petition on January 11, 1996, and was served with a citation and a copy of Plaintiffs' Original Class Action Petition herein on January 16, 1996.

Respectfully submitted,

Stanley, Mandel & Kleinman, P.C.
Attorneys for Plaintiffs

Vinson & Elkins, L.L.P.
Attorneys for Defendant

Excerpts From
Airline Ticket Tax: Victim of Budget Impasse[1]

WASHINGTON, Dec. 20 -- The Federal Aviation Administration said today that the 10 percent airline excise tax, which it collects to pay for the air traffic control system, would probably be a temporary victim of the budget impasse between the White House and Congress.

The loss of the tax, which will expire on December 31 unless it is renewed, would cost the Treasury about $15 million a day but would provide a windfall for air travelers.

It may also send hundreds of thousands of passengers to the airlines or the Internal Revenue Service seeking refunds.

"It's ridiculous, quite frankly" said James W. Coat, a staff member at the House Aviation Subcommittee. "You would just hope this budget situation in Washington works itself out."

Renewal of the ticket tax and two others -- a 10% a person fee on international departures and a 25 percent tax on air freight -- was in the budget reconciliation bill that President Clinton vetoed earlier this week. Lawrence J. Haas, a spokesman for the Office of Management and Budget, said that the Administration supported extension, but that the President had to veto the budget because of disagreements over Medicaid, Medicare and other issues.

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[1] Wald, Matthew L., *The New York Times*, p. 16, December 21, 1995.

"Should there be a better way?" He asked. "Yes, there should be a better way. But in this case our hands are tied."

* * *

For the fiscal year that ended on Sept. 30 -- which is the last day that the Federal Government had a fully functional budget -- the ticket tax brought in $4.88 billion; the departure tax, $244 million and the air freight tax $323 million.

"Mix-Up Over Airline Tax Has Treasury's Face Red"[2]

WASHINGTON, Feb. 3 -- It is not only taxpayers who have trouble figuring taxes. So does the United States Treasury, which, it turns out, never actually collected $1.2 billion in income last year that it thought it was receiving all along from the nation's airlines.

Stranger yet, although the airlines ultimately paid up and the Treasury now has the cash in hand, the money cannot be spent as intended.

There will be no tax penalties in this case. It is just that the Federal Aviation Administration, for which the money was bound, may have to stop repaving runways, buying new radar and making other investments in air travel improvement in about a month, officials say. And there are some red faces at the Treasury.

The money at issue was from an airline ticket tax that goes to the Airport Trust Fund, which pays for more than 80 percent of the aviation agency's budget. The ticket tax has lapsed twice in the last 13 months -- once at the beginning of last year and then, after it was reimposed in August, again at the beginning of this year.

The foul-up, which occurred after the tax took effect again late last summer, resulted from several things. First the airlines, through a close reading of the tax code, were able to avoid forwarding the money to the Treasury promptly. Then the Treasury failed to notice that the money was not coming in. By the time

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[2] Wald, Mathew L., *The New York Times*, February 4, 1997.

the airlines paid up, the tax had expired again, and along with it, the Treasury's authority to transfer the money to the trust fund.

As a result, the Clinton Administration has had to ask Congress to straighten out the mess, allowing Republicans on Capitol Hill to assert that reimposing the tax a second time -- a step that would have been inevitable sometime this year in any case -- is at the White House's request.

Hearings by the Senate Finance Committee are scheduled to begin on Tuesday; the House will probably follow before the end of the week.

Representative Bill Archer, the Texas Republican who heads the House Ways and Means Committee, said in a statement this evening that the members "are anxious to have from the Administration a complete explanation of the events leading up to this error, and their recommendations for rectifying the funding shortfall in the trust fund."

What become a tax nightmare began on Jan. 1, 1996, when Congress let the ticket tax lapse in a disagreement over how it should be structured: the tax was a flat 10 percent of the ticket price, and high-faire airlines argued that as a result their passengers were subsidizing those of low-fare airlines even though all air travelers put equal strain on public facilities.

Congress reimposed the tax on Aug. 27 but, with the issue still unresolved, let it lapse again this Jan. 1.

For the four months that the tax was back in effect late last year, the Treasury thought the airlines would pay the money twice a month, as they had for years. But the airlines read the tax code closely and

found a "safe harbor" clause that said no matter how much was due, they could not be assessed penalties for paying late if they paid at least what they had collected two quarters previously. Because the tax had lapsed in early 1996, that number was zero.

The Treasury never noticed that the money was not coming in, mostly, officials say, because the Treasury account that receives the tax was swollen by other excise taxes, on gasoline, liquor and tobacco. So every month the Treasury kept funneling money from general revenue into the Airport Trust Fund, as if the airlines were paying.

By the time the airlines had paid up, at the end of January, the tax had expired again, and the Treasury no longer had the authority to funnel the $1.2 billion into the F.A.A. fund.

The tax has always been part of the quoted sales price for a ticket and for years was mostly invisible to consumers. If it is reimposed, customers may see their fares rise, although airline experts say the ultimate price will depend on competition among the carriers.

While the mix-up threatens to bring a temporary halt to the F.A.A.'s capital projects, the agency says it has enough money to continue operations, including air traffic control, through the end of the year. The agency has survived without crisis so far because when the tax first lapsed, at the beginning of 1996, the trust fund had a balance of $4.4 billion.

"Senate Committee Prepares to Revive Airline Ticket Tax"[3]

"Southwest Chief Opposes Large Carriers' User Fee Proposal"

WASHINGTON -- The Senate Finance Committee will move to reinstate a handful of lapsed aviation taxes Wednesday in response to reports that the fund that pays for airport construction and improvements will run out of money four months earlier than anticipated.

"There is no question that adequate funding of the trust fund is critical to the safety and well-being of airline passengers," said the committee's chairman, Delaware Republican Sen. William V. Roth.

Transportation Department officials warn that if lawmakers don't act quickly to resolve the Federal Aviation Administration's current funding dilemma, airport construction and improvement projects across the country, including new terminal construction at Washington National Airport and Dulles International Airport in northern Virginia, could grind to a halt next month.

On Wednesday, Mr. Roth's committee will begin work on legislation to revive the 10 percent airline ticket tax that expired Dec. 31 and to transfer about $1.2 billion in airline tax payments from the Treasury Department's general fund to the aviation trust fund.

Meanwhile, at Tuesday's hearing on FAA funding, Herbert D. Kelleher, president and chief executive officer of Dallas-based Southwest Airlines,

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[3] *The Dallas Morning News*, February 5, 1997 (from wire reports).

told lawmakers they should stick with the recently lapsed 10 percent ticket tax rather than replace it with a "user fee" system championed by the seven largest U.S. airlines.

Mr. Kelleher, whose low-fare carrier has been widely credited with driving domestic air fares down, called the user fee espoused by the Big Seven a "destructive idea" that would actually raise U.S. domestic fares an average of 11.4 percent.

"The American people will abhor it," Mr. Kelleher said, arguing that the most price-sensitive segment of the air travel market will be hit by a highly regressive tax. As a result, Mr. Kelleher said, fewer people will fly.

"Southwest is America's low-fare policeman," Mr. Kelleher said. "The Big Seven want to kill the cop on the beat."

The proposal put forth by the seven largest U.S. airlines -- AMR Corp.'s American Airlines, Continental Airlines Inc., Delta Air Lines Inc., Northwest Airlines, Trans World Airlines, UAL Corp.'s United Airlines, and USAIR Group Inc. -- would replace the tax with a user fee of $2 per jet aircraft seat or $1 per commuter plane seat, plus $4.50 per passenger and a half-cent per passenger, per mile, not counting connecting flights.

Michael Levine, executive vice president for marketing and international affairs at Northwest Airlines, said Southwest's opposition to changing the method of FAA funding is not surprising. "They have such an amazingly good and unfair deal that there are no changes you could propose that wouldn't make them unhappy," Mr. Levine said Tuesday.

Government Accounting Office auditors say that while the 10 percent tax may not precisely reflect use of the system, the user fee proposal has some inequities of its own. For example, the fee is based on passenger miles between two points as the crow flies, and doesn't take into account the hub-and-spoke systems used by major airlines.

Treasury Secretary Robert Rubin sent a letter to Mr. Roth on Tuesday, urging him to act quickly on the issue.

"Some federal aviation capital programs will, absent a reinstatement of these aviation excise taxes, totally run out of money in the near future, Mr. Rubin wrote.

IRS Gives Travelers Wrong Directions[4]

Refunds of Airline Tax Not Taking Off --

Millions of airline passengers who bought tickets in advance for early 1996 travel found their trips more taxing than the law requires.

It turned out to be $1 billion or so more taxing -- and most travelers still haven't gotten refunds of the on-again off-again 10 percent ticket tax.

The $1 billion figure came from an airline industry official confirming the low end of estimates by Dallas lawyer Roger L. Mandel, who sued Southwest Airlines. Mr. Mandel filed a class-action lawsuit for travelers who tried in vain to get refunds the way the Internal Revenue Service directed them.

In the end, the courts said this week, the IRS was wrong all the time.

Although the IRS has a refund procedure, it told the industry to handle the task so it would escape the paperwork.

"They refuse to put out a release explaining how to get a direct IRS refund and went down a path where they didn't know the way and didn't know how to get back. So they told passengers to pressure airlines," said an industry executive who cited harsh words between airlines and the IRS.

The excise tax lapsed on Dec. 31, 1995, and was renewed in August 1996, but not retroactively, costing the government more than $3 billion in all in lost revenue. Tickets sold in early 1996 didn't include the tax, but tickets for 1996 trips sold before the new year

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[4] Murray, Frank J., *The Washington Times*, May 5, 1997.

included it in the expectation it would be renewed, as it had for four decades.

While some large airlines -- including American, Delta and United -- facilitated refunds for competitive reasons, Southwest, USAir and Alaskan were among those refusing to shoulder the expensive task.

The law "does not leave consumers at the mercy of the airlines. Consumers can seek a refund of any erroneously collected excise taxes from the IRS," a three judge panel of the 5th U.S. Circuit Court of Appeals said Monday in New Orleans.

"We recognize that this may inconvenience taxpayers," the court said, contending it would have been even more inconvenient to pay the tax at departure gates headed been reenacted. (A change in the law prevented a recurrence when the tax lapsed again for two months at the end of 1996.)

Federal courts in New York, Illinois and California reached similar conclusions.

Since Supreme Court intervention appears unlikely, the IRS may expect a blizzard of applications. But few travelers are likely to have kept original documents or be able to correctly apply on Form 8849, whose eight options do not include this once-in-a-lifetime error.

IRS spokesman could not provide anyone this week to explain the misdirection given taxpayers, but the agency said that in the first 14 months after the tax lapsed, it paid 49,807 refunds averaging $55.19, less than $3 million.

That is a tiny fraction of what lawyer Roger L. Mandel called "a huge windfall," and he says most of it

went to "sophisticated" tour operators, travel agents or corporate travel staffs.

IRS Special Taxes Director Marshall V. Washburn's letter telling the airlines to handle refunds so the IRS would have less paperwork triggered a nasty fight. The IRS set up a system to avoid duplicate refunds and promised no tax-audit problems from payouts.

IRS spokesmen were quoted in the press as sending taxpayers to airlines for refunds.

"Because they didn't want to issue the refunds, they tried to put the onus on the carriers," said Ed Merlis, the Air Transport Association's top lobbyist.

He said the tax produces $5 billion to $6 billion in most years and based his "upper limit" estimate of $1 billion overpaid on statistics for average advance purchased times.

"Too low," said Mr. Mandel, who sued Southwest Airlines, which maintained it only collects the tax and sends the money to the IRS.

"It's probably somewhere in the $1 billion to $2 billion range we're talking about here," Mr. Mandel said in an interview.

"The box that we have ourselves in is that courts are holding we can't get our money back from the airline and have to go to the IRS, but the IRS has made it practically impossible for the majority of people to get a refund," Mr. Mandel said.

Ann 96-9,1996-8 IRB, 02/09/96 -- IRC Secs. 4001, 4041, 4081, 4261, 4611

Ann. 96-9, 1996-8 IRB, 02/09/96

February 09, 1996

Code Secs. 4001; 4041; 4081; 4261; 4611

Retail and manufacturers excise taxes.

HEADNOTE:

Excise tax changes effective 1/1/96 were discussed, including fuel tax rate changes, expiration of superfund tax and air transportation tax, and increase in base amount of passenger cars not subject to luxury tax.

References: Code Sec. 4001, Code Sec. 4041, Code Sec. 4081, Code Sec. 4261, Code Sec. 4611

FULL TEXT:

The changes listed below are effective after December 31, 1995, and will be reflected on Form 720 for the first quarter of 1996, as well as on the next revisions of Forms 4136 and 8849. If these rates are modified by legislation, the IRS will issue another announcement and will revise all forms accordingly.

* * *

II. Luxury Tax

The base amount not subject to the luxury tax for passenger vehicles has increased from $32,000 to $34,000 effective for sales or uses occurring after December 31, 1995. Get Form 8807, Certain Manu-

facturers and Retailers Excise Taxes, from the IRS to compute the luxury tax.

III. Transportation Taxes

The excise tax on transportation of persons and property by air and use of international air travel facilities (IRS Nos. 26, 28, and 27) expired December 31, 1995. Travelers that paid for tickets in 1995 for travel in 1996 may be entitled to refunds of the tax. Some airlines are refunding the tax to the traveler. Therefore, contact the airline to discuss its refund policy or get Form 8849, Claim for Refund of Excise Taxes, from the IRS to obtain a refund. All refund claims submitted to IRS require an original passenger receipt.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
(Date Stamped January 11, 1996)

To: Ms. Laurie Sands
Director - Taxes
Alaska Airlines, Inc.
Seattle, WA 98168

The Federal excise tax imposed under section 4261 of the Internal Revenue Code on amounts paid for the transportation of persons by air has expired with respect to transportation beginning after December 31, 1995. Any extension of this tax may not be made retroactive to January 1, 1996.

We understand that you have been collecting and remitting the tax on tickets sold before January 1, 1996, for travel scheduled after December 31, 1995, on the assumption that the tax would be extended. Since the tax imposed under section 4261 has lapsed, persons who purchased tickets from you are entitled to refunds of the taxes collected and remitted for travel during the period the tax does not apply.

Section 6415 of the Internal Revenue Code provides that a carrier may claim the credit or refund for the overpaid taxes, provided the carrier can show that it refunded the tax to its customers, or if it obtains a statement from its customers that they consent to the carrier claiming the refund or credit. Alternatively, the customer can file a claim for refund of the overpaid taxes directly with the Internal Revenue Service (Service).

In order to minimize the number of customer refund claims filed with the Service during the income

tax filing season, we are encouraging the airline industry to use the provisions of section 6415 to either refund the taxes to their customers or to obtain customer consents to allow the carriers to claim the overpayment.

We have advised our field personnel that we expect to see temporary aberrations in deposit amounts and taxes reflected on returns as a result of the lapse in the tax imposed under section 4261 and the resulting refunds of the tax by the carriers to their customers. Such an aberration will not, in and of itself, trigger an examination or be the sole reason for deciding whether this issue should be scrutinized during an examination.

We have advised our field personnel that carriers might establish contingent refund liability accounts based on the passenger refunds they expect to make. This will result in adjustments to the carriers' separate tax accounts that may produce zero or negative balances. We also advised our field personnel that it would be appropriate for carriers to maintain these contingent accounts through the first calendar quarter of 1997.

No examination techniques beyond those ordinarily used in examining other customer credits or refunds will be used in examining this issue. No refunds to customers resulting from the lapse in the tax will be included in any audit sample for extrapolation over any period other than the period during which the tax has lapsed.

Acceptable documentation for this issue will include either a consent executed by the traveler or, in cases where customer refunds or credits have been issued, canceled checks, credit card credit vouchers, or

an electronic system of records with an appropriate audit trail. It is not necessary that you obtain the Social Security or Taxpayer Identification Numbers of the recipients of any refund resulting from the lapse in the tax. However, ticket numbers must be recorded in order to decrease the risk of duplicate claims.

In any examination, our personnel will accept refunds that are ticket specific and will not focus on situations where the passenger is not the purchaser. No adjustments will be proposed on refunds made to passengers where the identity of the purchaser is unknown or unclear.

In order to avoid situations where someone other than the purchaser receives a refund or a customer receives a refund from you and also files a claim for refund with the Service, the original passenger receipts should be taken out of circulation at the time you make a refund. You may either collect the passenger receipts or mark them to indicate that a refund has been issued by the carrier. It is not necessary that you keep the receipts collected. You may certify that they have been collected and destroyed. As an alternative to collecting or marking the passenger receipts, you may provide us with computerized records of refunds issued due to the lapse in tax, so that we can identify possible duplicate refunds.

If you have any questions, please contact me at (202) 622-5563 or Ricky Stiff, Director, Office of Excise Taxes at (202) 622-5521.

Sincerely,

Marshall V. Washburn
National Director,
Specialty Taxes

Excerpts from Form 8849
Claim for Refund of Excise Taxes[5]

. . .

1. Type of return filed, if any (see instructions):

☐ 720

☐ 730

☐ 2290

2. Amount to be refunded: $_____

3. **Gasoline Wholesale Distributors** (See instructions.)

. . .

4. **Gasohol Blenders** (See instructions.)

. . .

5. **Off-Highway Business Use of Gasoline** (See instructions.)

. . .

6. **Registered Ultimate Vendors of Diesel Fuel** (claims for fuel sold to a buyer for the buyer's use on a farm for farming purposes or to a state or local government for its exclusive use) (See instructions.)

. . .

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[5] To view the complete form as published, *see* Internal Revenue Service Form 8849, *"Claim for Refund of Excise Taxes,"* published by Tax Management, Inc., a subsidiary of The Bureau of National Affairs, Inc., Jan. 1994, OMB No. 1545-1420, Exp. 12-31-96.

7. **Nontaxable Use of Undyed Diesel Fuel** (except for use on a farm for farming purposes or the exclusive use of a state or local government) (See instructions.)

. . .

8. **Train and Intercity Bus Use of Undyed Diesel Fuel** (See instructions.)

. . .

9. **Explanations and additional claims.** Explain why you believe this claim should be allowed, and show computation of amount to be refunded. Also include claims for fuel not covered on lines 3 - 8.

. . .

Excerpts from Instructions for Form 8849
(January 1994)
Claim for Refund of Excise Taxes[6]

* * *

General Instructions

Use Form 8849 to claim refunds of excise taxes you reported on Form 720, 730 or 2290, including the repealed luxury taxes. Also use Form 8849 to claim refunds of excise taxes imposed on fuels, chemicals, and other articles that are later used for nontaxable purposes or for which there is reduced rate of tax.

* * *

Processing of your claim will be delayed or it will be returned to you if you do not follow the required procedures or do not provide all the required information.

* * *

Specific Instructions

Line 1

Check the appropriate box to show the type of excise tax return you filed, if any, to report the tax being refunded.

* * *

Claims for Excise Taxes on Gasoline

Line 3, Gasoline Wholesale Distributors

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[6] To view the complete form as published, *see "Instructions for Form 8849,"* Cat. No. 204681, published by Tax Management, Inc., a subsidiary of The Bureau of National Affairs, Inc., Mar. 1994.

. . .

Line 4, Gasohol Blenders

* * *

Line 5, Off-Highway Business Use of Gasoline

* * *

Claims for Excise Taxes on Diesel Fuel

Line 6, Registered Ultimate Vendors of Diesel Fuel

* * *

Line 7, Nontaxable Use of Undyed Diesel Fuel

* * *

Line 8, Train and Intercity Bus Use of Undyed Diesel Fuel

* * *

Line 9, Explanations and Additional Claims

Include on this line any additional information as required in the instructions. Use this line to claim refunds for chemicals and other articles used for nontaxable purposes. Also include on this line claims for nontaxable uses of fuel not listed on lines 3-8, including nontaxable uses of gasoline.

The other nontaxable uses of gasoline are:

1. Gasoline that is exported;

2. Use in a boat employed in the business of commercial fishing;

3. Use in a bus while the bus is engaged in the transportation of students and employees of schools

(as defined in the last sentence of section 4221(d)(7)(C));

4. Use in a a qualified local bus (described in section 6427(b(2)(D)) while the bus is engaged in furnishing (for compensation) intracity passenger land transportation that is available to the general public and is scheduled and along regular routes;

5. Exclusive use of a state or local government;

6. Exclusive use of a nonprofit educational organization; and

7. Use by the purchaser as supplies for vessels or aircraft.

Excerpt from Form 8849[7]
"Claim for Refund of Excise Taxes," Showing How the IRS Requires the Form to be Filled Out To Receive a Refund of the Airline Ticket Tax

* * *

9. **Explanations and additional claims.** Explain why you believe this claim should be allowed, and show computation of amount to be refunded. Also include claims for fuel not covered on lines 3 - 8.

"TRANSPORTATION OF PERSONS BY AIR

Claimant purchased air travel ticket on or before December 31, 1995, and traveled using such ticket after December 31, 1995, at a time when there was no domestic air transportation tax or international air transportation tax imposed.

DATES TICKET PURCHASED - _____

DATE(S) FLOWN USING TICKET - _____

DOMESTIC AIR TRANSPORTATION TAX (PER TICKET) 10.0% $_____

INTERNATIONAL AIR TRANSPORTATION TAX (PER TICKET) $6.00 $_____

TOTAL $_____"

* * *

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[7] To view the complete form as published, *see* Revenue Service Form 8849, *"Claim for Refund of Excise Taxes,"* published by Tax Management, Inc., a subsidiary of The Bureau of National Affairs, Inc., Jan. 1994, OMB No. 1545-1420, Exp. 12-31-96.

No. 97-374

Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ERNESTO D. SIGMON, *et al.*,

Petitioners,

vs.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820
Attorneys for Southwest Airlines Co.

September 29,1997

CASILLAS PRESS • 1717 K STREET, N.W. • WASHINGTON, D.C. 20006 • 1-800-947-2650

QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' state-law claims, because:

   A. those claims are expressly preempted by 26 U.S.C. § 7422, which provides that this tax-refund action "may be maintained only against the United States" and/or

   B. those claims are impliedly preempted by 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States?

2. Whether the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' federal claim under 26 U.S.C. § 6415(c), because:

   A. 26 U.S.C. § 6415(c), which applies only to "overcollection[s] of . . . tax" resulting from mechanical or clerical errors, is inapplicable to the allegedly illegal collections underlying this action and/or

   B. 26 U.S.C. § 6415(c) provides no private right of action?

PARTIES TO THE PROCEEDING

Petitioners Ernesto D. Sigmon and William Gregory Hassler were Plaintiffs-Appellants in the Court of Appeals. Respondent Southwest Airlines Co. was Defendant-Appellee in the Court of Appeals. All of the parties to the proceedings below are parties in this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent has no parent or subsidiary companies.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
1. Statement of Facts. 1
2. Course of Proceedings and Disposition Below. ... 3
REASONS TO DENY THE WRIT 5
1. THE LOWER COURTS ARE IN COMPLETE AGREEMENT CONCERNING THE ISSUES PRESENTED BY THIS CASE. 5
2. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS . 7
A. The Internal Revenue Code Preempts Petitioners' State-Law Claims. 8
i. 26 U.S.C. § 7422 Expressly Preempts Petitioners' State-Law Claims. 8
a. Petitioners' State-Law Claims Fall Within the Scope of 26 U.S.C. § 7422 . 9
b. The "Colorable Basis" Test Is Inapplicable. 11
ii. 26 U.S.C. § 7501 Impliedly Preempts Petitioners' State-Law Claims. 15
B. Petitioners' Federal Claims Also Fail as a Matter of Law. 17
i. 26 U.S.C. § 6415(c) Is Inapplicable. 17
ii. 26 U.S.C. § 6415(c) Provides No Private Right of Action. 20
a. Section 6415(c) Grants No Special Rights to Taxpayers. 22
b. Congress Intended No Private Cause of Action. 23
c. Implying a Cause of Action Would Frustrate the Goals of Section 7422. . 24
d. Adequate Remedies Already Exist. . . 25
CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Begier v. Internal Revenue Service, 496 U.S. 53 (1990) . 16
Bob Jones University v. Simon, 416 U.S. 725 (1974) . . . 12
Brennan v. Southwest Airlines Co., No. C96-1841-VRW (N.D. Cal. Sept. 6, 1996), *appeal docketed*, (9th Cir. Nov. 6, 1996) . . . . . *passim*
Bright v. Bechtel Petroleum, Inc., 780 F.2d 766 (9th Cir. 1986) 6
Burda v. M. Ecker Co., 954 F.2d 434 (7th Cir. 1992) 6
Burda v. M. Ecker Co., 1990 WL 17075 (N.D. Ill. Feb. 6, 1990), *aff'd in relevant part*, 954 F.2d 434 (7th Cir. 1992) 10-11
Cannon v. University of Chicago, 441 U.S. 677 (1979) 21,22
Columbia Marine Services, Inc. v. Reffet Ltd., 861 F.2d 18 (2d Cir. 1988) 6
Cort v. Ash, 422 U.S. 66 (1975) . . . . . *passim*
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Eisenman v. Continental Airlines, Inc., ___ F. Supp. ___, 1997 WL 432032 (D.N.J. July 23, 1997) . . . . . *passim*
Enochs v. Williams Packing & Navigation Company, 370 U.S. 1 (1962) . . . . . *passim*
Flora v. United States, 362 U.S. 145 (1960) 25
Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S. Ct. 1483 (1995) 17
Kaucky v. Southwest Airlines Co., 1996 WL 267875 (N.D. Ill. May 17, 1996), *aff'd*, 109 F.3d 349 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347) . . . . . *passim*

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Lehman v. USAir Group, Inc., 930 F. Supp. 912 (S.D.N.Y. 1996) ..... *passim*
Meggs v. Best, 561 F. Supp. 1229 (S.D. Ga. 1983) 6,10,16
Mehrig v. KFC Western, Inc., ___ U.S. ___, 116 S. Ct. 1251 (1996) 21
Merrill-Lynch Pierce, Fenner & Smith, P.C. v. Curran, 456 U.S. 353 (1981) 21
Middlesex Cty. Sewer. Auth. v. National Sea Clammers Ass'n, 453 U.S. 11 (1981) 21
Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932) 11-12
Poretto v. Usry, 295 F.2d 499 (5th Cir. 1961), *cert. denied*, 369 U.S. 810 (1962) 25
Sigmon v. Southwest Airlines Co., No. 3-96CV0393-H N.D. Tex. May 23, 1996), *aff'd*, 110 F.3d 1200 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374) ..... *passim*
Sigmon v. Southwest Airlines Co., 110 F.3d 1200 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374) ..... *passim*
Snyder v. Marks, 109 U.S. 189 (1883) 24-25
Thompson v. Thompson, 484 U.S. 174 (1988) 21,22
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 21,22,23
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 21,23

Statutes

Pub. L. No. 88-52, 77 Stat. 72 (1963) 1
Pub. L. No. 88-348, 78 Stat. 237 (1964) 1
Pub. L. No. 100-223, 101 Stat. 1532 (1987) 1
Pub. L. No. 101-508, 104 Stat. 1388 (1990) 1
Pub. L. No. 104-188, 110 Stat. 1755 (1996) 1-2
Pub. L. No. 105-2, 111 Stat. 4 (1997) 2

26 U.S.C. § 4261 ..... *passim*
26 U.S.C. § 4291 1
26 U.S.C. § 6302 1,2,3,4,13
26 U.S.C. § 6415 ..... *passim*
26 U.S.C. § 6672 3,25
26 U.S.C. § 7201 13
26 U.S.C. § 7202 13,25
26 U.S.C. § 7421 11-12
26 U.S.C. § 7422 ..... *passim*
26 U.S.C. § 7501 1,5,8,16
28 U.S.C. § 1331 3
28 U.S.C. § 1340 3
28 U.S.C. § 1367 3

Rules and Regulations

26 C.F.R. § 40.6302(c)-3 (1995) 2,3,4,13
26 C.F.R. § 301.6415(c) (1976) 18
Treas. Reg. 43, Art. 65, 66 (1921) 18

Miscellaneous

S. Rep. No. 1625, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 3676 23

For the reasons stated below, Respondents respectfully urge the Court to deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Statement of Facts.

Until Congress and the President unexpectedly allowed it to expire on December 31, 1995, 26 U.S.C. § 4261 imposed a ten percent (10%) excise tax on airline tickets. 26 U.S.C. § 4261. Before it expired, Section 4261 required airlines to collect a 10% excise tax on airline tickets and to remit the taxes so collected to the IRS. *See* 26 U.S.C. §§ 4261, 4291, 6302, 7501.

Congress first enacted the air-passenger excise tax more than four decades ago and extended the tax each time it was due to expire. Although Congress often waited until the eleventh hour to extend the tax, Congress never before failed to do so.[1] Throughout 1995, therefore, the airlines and the IRS once again expected Congress to extend the tax, which generated billions of dollars in tax revenues in recent years. Indeed, in November 1995, the House and Senate passed legislation that would have extended the tax for several years. Because that legislation also contained a controversial provision concerning Medicare and Welfare, however, the President vetoed the bill on December 6, 1995, and the tax expired at midnight on December 31, 1995.[2]

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[1]In 1963, for example, when the tax was due to expire on July 1, Congress extended it on June 29. Pub. L. No. 88-52, 77 Stat. 72 (1963). In 1964, when the tax once again was due to expire on July 1, Congress extended it on June 20. Pub. L. No. 88-348, 78 Stat. 237 (1964). In 1987, when the tax was due to expire on December 31, Congress extended it on December 30, with only one day to spare. Pub. L. No. 100-223, 101 Stat. 1532 (1987). More recently, Congress postponed the expiration from December 31, 1990, to December 31, 1995, by legislation that became law on November 5, 1990, ***after*** the adjournment *sine die* of the 101st Congress. Pub. L. No. 101-508, 104 Stat. 1388, 1432 (1990).

[2]On August 20, 1996, President Clinton signed legislation temporarily reenacting the tax for the remainder of 1996. *See* Pub. L.

Throughout 1995, Southwest reasonably believed that Congress would once again timely extend the tax or, failing that, reenact it retrospectively. Pet. App. at A2 n.1, E1-E2. Thus, Southwest, like other airlines, continued throughout 1995 to collect the excise tax on advance-purchase tickets for 1996 travel. *Id.*[3] Pursuant to its longstanding practice and in accordance with 26 U.S.C. §§ 6302 & 7501 and 26 C.F.R. § 40.6302(c)-3, Southwest then timely remitted all such excise taxes to the IRS. *See* Deposition of Rhonda Heatly ("Heatly Depo.") at 55-56, 86-87 (R2:64-65, 95-96).[4]

No. 104-188, § 1609(b), 110 Stat. 1755, 1841 (1996). After that legislation expired on December 31, 1996, Congress enacted similar temporary legislation in February 1997. *See* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997). Recognizing the tremendous difficulty posed by last-minute collection of the tax on tickets already sold, Congress exempted from the 1996 tax travel on tickets purchased prior to its effective date, August 27, 1996, regardless of the date of travel. *Id.* § 1609(i). In the 1997 legislation, Congress went even further to avoid difficulty, expressly providing that the 1997 tax is applicable not only to tickets purchased for travel prior to the September 30, 1997, expiration date, but also to tickets purchased for travel after September 30, 1997, if purchased prior to that date. *See* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997).

[3]Given the airlines' practice of issuing advance-purchase tickets months before departure, especially for holiday travel, failing to collect the tax throughout 1995 on tickets sold for 1996 travel could have caused substantial hardship. If Congress and the President had extended the tax before its expiration on December 31, 1995, an airline's failure to collect the tax at the time of sale would have required the airline to collect the tax ***at its departure gates***, as passengers attempted to board airplanes to return home from holiday travel. As Congress recognized in its 1996 and 1997 legislation reenacting the tax, the impact of such last-minute tax collections on the national air-traffic system and on families whose travel budgets had been exhausted would have been horrendous. *See* Pub. L. No. 104-188, § 1609(i), 110 Stat. 1755, 1844 (1996) (exempting from Section 4261 as reenacted effective August 27, 1996, travel on tickets paid for on or before August 26, 1996); *see also* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5, (1997) (providing that tax imposed by 4261 is applicable not only to transportation beginning prior to September 30, 1997, but also to "amounts paid during such period for transportation beginning after such period").

[4]Southwest believes that its payments to the IRS are irrelevant to

Despite such full and timely remittance to the IRS, Southwest also has voluntarily refunded directly to its customers all monies it collected in January 1996 as excise taxes and thousands of dollars it collected in 1995 on tickets used for travel in 1996. *Id.* at 49, 62-64, 67-72 & Exhibit C (R2:58, 71-73, 76-81, 123-46).

2. Course of Proceedings and Disposition Below.

Petitioners filed this action in state court in Dallas, Texas, suing on behalf of all persons who purchased airline tickets from Southwest for travel occurring after December 31, 1995, and alleging that the ticket prices such passengers paid illegally included the 10% excise tax previously required by 26 U.S.C. § 4261(a). Southwest timely removed the action to the United States District Court for the Northern District of Texas, invoking federal-question jurisdiction under 28 U.S.C. §§ 1331, 1340 & 1367. Shortly thereafter, Southwest filed a motion to dismiss, arguing, *inter alia,* that Petitioners' purported state-law claims were preempted by 26 U.S.C. § 7422, which provides that actions to recover monies alleged to have been collected

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the question whether Petitioners may maintain this action. *See Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 352 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (holding: "It makes no difference whether [Southwest] is still holding the money it erroneously collected or has passed it on to the IRS. The principal [the IRS] is bound by the agent's [Southwest's] act. The IRS has plenty of remedies against its collection agents who fail to remit taxes that they collect. *See* 26 U.S.C. § 6672(a)."); *see also Sigmon v. Southwest Airlines Co.*, No. 3-96CV0393-H, Transcript of Proceedings Before the Honorable Barefoot Sanders, United States District Judge, at 29 (N.D. Tex. May 23, 1996) (R3:29) (holding that "[w]hether [Southwest] paid over the proper amount to the revenue service is really not the issue"), *aff'd*, 110 F.3d 1200 (5th Cir. 1997) (Pet. App. at A1-A16), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997). Nevertheless, the record is crystal clear that Southwest timely remitted to the IRS on the schedule imposed by 26 C.F.R. § 40.6302(c)-3 an amount equal to its total liability under 26 U.S.C. § 6302 for the monies Southwest collected as excise taxes in 1995, including the monies Southwest collected in 1995 as excise taxes on travel in 1996. *See* Heatly Depo. at 55-56, 86-87 (R2:64-65, 95-96).

illegally as federal taxes "may be maintained only against the United States."

Petitioners responded to Southwest's motion by seeking leave to file an amended complaint asserting a federal claim directly under 26 U.S.C. § 6415(c) and alleging that Southwest had failed to remit to the IRS the monies it had collected in 1995 as excise taxes on travel occurring in 1996. Petitioners argued that their new allegation that Southwest failed to remit to the IRS the monies it had collected in 1995 as excise taxes on travel occurring in 1996 raised an issue of fact precluding dismissal of their state-law claims under 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c) created an exception to Congress' mandate in Section 7422 that actions to recover monies alleged to have been collected illegally as federal taxes "may be maintained only against the United States."

After the District Court granted Petitioners leave to file their amended complaint, Southwest moved to convert its motion to dismiss into one for summary judgment and for leave to file summary-judgment evidence that Southwest had timely remitted to the IRS on the schedule imposed by 26 C.F.R. § 40.6302(c)-3 an amount equal to its total liability under 26 U.S.C. § 6302 for the monies Southwest collected as excise taxes in 1995, including the monies Southwest collected in 1995 as excise taxes on travel occurring in 1996. The District Court granted that motion and accepted summary-judgment evidence on the question whether Southwest had timely remitted the disputed funds to the IRS.

On May 23, 1996, the District Court granted summary judgment in favor of Southwest. Pet. App. at B1-B3; R3:26-30. The court concluded, *inter alia*, that Petitioners' state-law claims were barred by 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c) provided Petitioners no private right of action. R3:26-30. In reaching that decision, the court held that Petitioners' allegation that Southwest had not timely remitted the disputed funds to the IRS was immaterial. *Id.*

On April 28, 1997, the Fifth Circuit affirmed the District Court's summary judgment in favor of Southwest, holding that Petitioners' state-law claims were barred by 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c), even if applicable, gave Petitioners no private right of action. Pet. App. at A1-A16.

REASONS TO DENY THE WRIT

1. THE LOWER COURTS ARE IN COMPLETE AGREEMENT CONCERNING THE ISSUES PRESENTED BY THIS CASE.

This is one of four cases in which a federal court has recently dismissed claims seeking recovery of monies alleged to have been illegally collected as excise taxes on tickets sold in 1995 for air travel in 1996, after the expiration of 26 U.S.C. § 4261 on December 31, 1995. *See Brennan v. Southwest Airlines Co.*, No. C 96-1841-VRW, Transcript of Proceedings Before the Honorable Vaughn R. Walker, United States District Judge, at 22-25 (N.D. Cal. Sept. 6, 1996) [hereinafter, "*Brennan*, Transcript at __"], *appeal docketed*, No. 96-17053 (9th Cir. Nov. 6, 1996); *Lehman v. USAir Group, Inc.*, 930 F. Supp. 912, 914-16 (S.D.N.Y. 1996); *Sigmon v. Southwest Airlines Co.*, No. 3-96CV0393-H, Transcript of Proceedings Before the Honorable Barefoot Sanders, United States District Judge, at 26-30 (N.D. Tex. May 23, 1996) (R3:26-30) [hereinafter, "*Sigmon*, Transcript at __"], *aff'd*, 110 F.3d 1200 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374); *Kaucky v. Southwest Airlines Co.*, 1996 WL 267875 (N.D. Ill. May 17, 1996), *aff'd*, 109 F.3d 349 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347). The fully briefed motion to dismiss a fifth case, the *Eisenman* case in the District of New Jersey, is likely to be granted soon. *See Eisenman v. Continental Airlines, Inc.*, ___ F. Supp. ___, ___, 1997 WL 432032, *12 (D.N.J. July 23, 1997) (reversing magistrate's decision to remand passenger's tax-refund action against Continental Airlines to state court

and suggesting the propriety of granting Continental's motion to dismiss under 26 U.S.C. § 7422).

In each of the four dismissed cases, the District Court followed the reasoning of the leading case applying 26 U.S.C. § 7422 to actions against private tax collectors, *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co. (AT&T)*, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978), and held that actions against airlines to recover amounts alleged to have been illegally collected as excise taxes on 1996 travel are barred by 26 U.S.C. § 7422, which provides that actions to recover monies alleged to have been collected illegally as federal taxes "may be maintained only against the United States." *See Sigmon*, Transcript at 26-30 (R3:26-30); *see also Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16; *Kaucky*, 1996 WL 267875, *2-4. In two of the four cases, this case out of the Northern District of Texas and the *Kaucky* case out of the Northern District of Illinois, the Fifth and Seventh Circuits have unanimously affirmed the reasoning uniformly applied in the District Courts. *See Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997) (Pet. App. at A1-A16), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347).[5]

Nothing in any of these decisions of the lower federal courts suggests a need for this Court's guidance on the issues presented by this case. Rather, these decisions show that the lower courts are in complete agreement that 26 U.S.C. § 7422 bars state-law claims against airlines for

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[5] *See also, e.g., Burda v. M. Ecker Co.*, 954 F.2d 434, 439 (7th Cir. 1992); *Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768-770 (9th Cir. 1986); *Meggs v. Best*, 561 F. Supp. 1229, 1230 (S.D. Ga. 1983); *DuPont Glore Forgan Inc. v. American Telephone & Telegraph Co. (AT&T)*, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Econ, Inc. v. Illinois Bell Tel. Co.*, 351 F. Supp. 1087, 1089 (N.D. Ill. 1972).

the recovery of monies alleged to have been illegally collected as excise taxes and that 26 U.S.C. § 6415(c) provides passengers no federal cause of action to recover such monies. Thus, the current state of the law as it has developed in the lower courts clearly does not justify an exercise of this Court's jurisdiction to secure uniformity of judgments.

Moreover, other opportunities to address the issues presented by this case are likely, as there are two more cases in the pipeline. The dismissal of the *Brennan* case in the Northern District of California is pending on appeal before the Ninth Circuit,[6] and an appeal of the *Eisenman* case to the Third Circuit is expected.[7] In the event that the Ninth Circuit in *Brennan* or the Third Circuit in *Eisenman* reaches a result that is at odds with those reached by the Fifth Circuit in this case and the Seventh Circuit in *Kaucky*, review in this Court might be appropriate to resolve the resulting conflict among the circuits. Because no such conflict has yet arisen, however, and the putative plaintiff class alleged in this case is subsumed within the plaintiff class alleged in *Brennan*, denying the Petition in this case would properly conserve the Court's scarce resources for use on a more appropriate day without causing even the slighest risk of injustice to the class Petitioners seek to represent.

2. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS.

Even if this case were the Court's sole opportunity to review the issues presented by the Petition, denying the writ still would be appropriate, because the Fifth Circuit clearly was correct to affirm the District Court's dismissal of Petitioners' claims. Petitioners' state-law claims against Southwest are expressly and impliedly preempted by the Internal Revenue Code, and the statute underlying

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[6]Argument of the *Brennan* case is scheduled for November 7, 1997.

[7]The *Lehman* plaintiffs did not appeal.

Petitioners' federal claim, 26 U.S.C. § 6415(c), neither applies to this case nor provides a private right of action. Thus, even if this were the only case in the pipeline, which it is not,[8] and even if this Court were concerned primarily with the correction of errors in particular cases, which it is not,[9] denying the Petition still would be appropriate.

A. The Internal Revenue Code Preempts Petitioners' State-Law Claims.

Contrary to Petitioners' assertions, their state-law claims fall within the preemptive reach of 26 U.S.C. § 7422, and *Enochs v. Williams Packing & Navigation Co.* cannot save those claims from dismissal. Further, Petitioners' state-law claims also are impliedly preempted by 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States. Thus, the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' state-law claims.

i. 26 U.S.C. § 7422 Expressly Preempts Petitioners' State-Law Claims.

Nothing would bar Petitioners from ***requesting*** a refund of erroneously collected excise taxes from Southwest, and nothing would bar Southwest from ***voluntarily*** providing such a refund and seeking reimbursement from the IRS. Indeed, Southwest had voluntarily provided more than a thousand such refunds long before this lawsuit was filed. *See supra* at 3.

On the other hand, a passenger who seeks to ***compel*** a refund through a lawsuit must bring his or her action against the United States; he or she may not judicially compel such a refund from Southwest or from any other non-governmental tax collector. Under 26 U.S.C. § 7422(f)(1),

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[8] *See supra* at 7.

[9] *See* The Honorable Fred M. Vinson, Chief Justice of the United States, Work of the Federal Courts: An Address before the American Bar Association, Sept. 7, 1949, *in* 69 S. Ct. v, vi (1949).

"[m]oney collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered ***only*** from the government, because a claim or suit to collect such money is a claim or suit for a tax refund." *Kaucky*, 109 F.3d at 353 (emphasis added); *see also* Pet. App. at A7.

a. Petitioners' State-Law Claims Fall Within the Scope of 26 U.S.C. § 7422.

The plain language of 26 U.S.C. § 7422(f)(1) provides that a suit to recover any amount alleged to have been erroneously or illegally collected as an internal revenue tax "may be maintained only against the United States . . . ." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995).[10] Following that plain language, the lower federal courts have unanimously concluded that section 7422 bars lawsuits brought against airlines to recover monies collected as excise taxes on 1996 travel. *See* Pet. App. at A7-A10; *Kaucky*, 109 F.3d at 351-53; *Eisenman*, 1997 WL 432032, *11; *Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16. All of the lower courts have held that the exclusive avenue to recover monies alleged to have been illegally collected by airlines as federal excise taxes on 1996 travel is an action against the United States pursuant to 26 U.S.C. § 7422. *See* Pet. App. at A7-A15; *Kaucky*, 109 F.3d at 351-53; *Eisenman*,

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[10]Section 7422(f)(1) provides: "A suit or proceeding referred to in subsection (a) [of Section 7422] may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995). Section 7422(a), to which Section 7422(f)(1) refers, provides: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a) (Lawyers' Co-op. 1995). Thus, read in context, Section 7422(f)(1) provides that a suit or proceeding for the recovery of monies alleged to have been erroneously or illegally collected as an internal revenue tax "may be maintained only against the United States . . . ." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995).

1997 WL 432032, *11; *Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16.[11]

In this case, as in *Kaucky*, *Lehman*, and *Brennan*, the plaintiffs have sought to recover monies alleged to have been erroneously or illegally collected as federal excise taxes by a lawful agent of the IRS. *See* R1:98-105. Thus, the Fifth Circuit clearly was correct to affirm the District Court's dismissal of Petitioners' claims pursuant to Section 7422, which expressly preempts state-law claims for federal tax refunds. Pet. App. at A10 ("The exclusive remedy provided by the Internal Revenue Code [§ 7422] . . . preempts . . . state-law claims against a private entity."); *Kaucky*, 109 F.3d at 351 (holding that Section 7422 completely preempts state-law claims for tax refunds); *Lehman*, 930 F. Supp. at 916 (holding that Section 7422 barred state-law claims against Continental and USAir to recover monies alleged to have been illegally collected as excise taxes on 1996 travel, reasoning that "Section 7422 provides that the exclusive remedy for a tax refund is an action against the United States" and that passengers' "state law claims against the airlines [were] expressly pre-empted by § 7422"); *Burda v. M. Ecker* Co., 1990 WL 17075 at *8 (N.D. Ill. Feb. 6, 1990)

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[11]This reasoning is buoyed by the late Judge Weinfeld's seminal study of Section 7422 in the *AT&T* case. *See AT&T*, 428 F. Supp. at 1301 (reasoning that "an overall view of the tax collection and refund provisions of the [Internal Revenue] Code, and of the mandated role of non-governmental collecting agents . . . shows that aggrieved taxpayers . . . ***must*** bring their suit against the government") (emphasis added); *id.* at 1302 ("[T]he language of section 7422 is unambiguous in requiring that a suit for the recovery of 'erroneously or illegally' overpaid taxes may be brought ***only*** against the United States.") (emphasis added). Like Judge Posner in *Kaucky*, Judge Weinfeld concluded in *AT&T* "that section 7422(f) means precisely what it says, and . . . plaintiffs may maintain a tax refund claim ***only*** against the government and not against collecting agents." *Id.* at 1303 (emphasis added); *see also Meggs*, 561 F. Supp. at 1230 (United States -- not private collector of plaintiff's income tax -- was proper defendant for tax-refund suit); *Econ, Inc.*, 351 F. Supp. at 1089 (dismissing refund suit against statutory collector of excise tax and noting that United States would be real party in interest if IRS rejected plaintiff's administrative claim).

(holding that "the purported state claim pled by the plaintiff [was] completely pre-empted" by 26 U.S.C. § 7422), *aff'd in relevant part*, 954 F.2d 434, 439 (7th Cir. 1992).[12]

b. The "Colorable Basis" Test Is Inapplicable.

The Fifth Circuit also was correct to affirm Judge Sanders' conclusion that the "colorable basis" rationale articulated in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), cannot save this case from dismissal. Although Southwest clearly had probable cause to believe in late 1995 and early 1996 that the excise tax imposed by 26 U.S.C. § 4261 would be extended or reenacted to cover travel occurring on or after January 1, 1996, *see supra* at 1-3, and thus had a "colorable basis" for the challenged collections, *Kaucky*, 109 F.3d at 352; Pet. App. at A10; *Eisenman*, 1997 WL 432032, *7, *Enochs*' "colorable basis" test is inapplicable to cases brought to recover monies erroneously collected as federal taxes.[13]

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[12]The plain language of Section 7422 applies to all claims, however denominated or pleaded, that seek "recovery of ***any*** internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of ***any*** sum alleged to have been . . . in ***any*** manner wrongfully collected" as a federal tax. 26 U.S.C.S. § 7422(a) (Lawyers' Co-op. 1995) (emphasis added). Thus, Petitioners merely beg the question when they insist that this is not a "tax refund suit" within the preemptive reach of Section 7422 because no "tax" was applicable to their tickets. In virtually every tax-refund case, the plaintiff asserts that the challenged collection was partially or wholly invalid and that the amount collected was not due as a lawful "tax." *See, e.g., AT&T*, 428 F. Supp. at 1302. If construed not to apply to such cases, Section 7422 would become a dead letter. *See Kaucky*, 109 F.3d at 351 (holding that "the literal sense" is not "the right sense" in which to interpret the phrase "tax refund suit"); *see also* Pet. App. A8 (same, quoting *Kaucky*).

[13]*Enochs* was an action brought in 1957 to enjoin the collection of past due social security and unemployment taxes. The District Court granted the injunction, and the Supreme Court, relying on 26 U.S.C. § 7421(a), reversed. In reaching its decision, the *Enochs* Court reconciled its holding with the Court's much-criticized decision in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), by observing in

First, the "colorable basis" test addresses an irrelevant issue. The rationale for enjoining future tax collections where the collecting entity has no "colorable basis" for its proposed collection is obvious: such an injunction would enable the taxpayer to keep his money in his pocket and save both the taxpayer and the Government the costs of processing a tax-refund claim. Although the same could be said for an injunction against any improper collection, even one for which a "colorable basis" existed, the balance between protecting taxpayers and keeping the courts out of the taxation business tips in favor of an injunction only where it is clear that there is no arguable basis for the proposed collection and thus no danger that an injunction would improperly interfere with Congress' comprehensive administrative scheme for collecting and, if necessary, refunding taxes. If, and only if, there is no "colorable basis" for a proposed collection, the policy of protecting taxpayers and the national economy from the costs of processing refund claims outweighs the policy of avoiding judicial interference with Congress' comprehensive taxing mechanism. In that circumstance only, it makes sense for a court to intercede early and enjoin an obviously unlawful collection that, in the long run, would merely impose needless collection and refund costs.

Where collection of an allegedly improper tax has already occurred, the balance never tips in favor of early judicial intervention. Once an allegedly erroneous or illegal

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dictum that an injunction against the collection of future taxes might be appropriate notwithstanding 26 U.S.C. § 7421(a) if, based on the information available to the Government at the time of suit, it were obvious that the Government could not prevail in a subsequent tax-refund suit ***and*** if equity jurisdiction otherwise were to exist. As the Court observed in *Bob Jones University v. Simon*, 416 U.S. 725, 744-45 (1974), the *Enochs* Court undertook "to rehabilitate [26 U.S.C. § 7421] following [the] debilitating departure[] from its explicit language" via the injunction granted in *Miller*. Thus, Petitioners' insistence at pages 8-14 of the Petition that the Fifth Circuit erred by failing to read *Enochs* to require judicial intervention in the administration of tax refunds is meritless.

collection has occurred, no judicial remedy can save the taxpayer or the national economy from the expense of seeking a refund. Thus, where the allegedly improper collection has already occurred, the reason for allowing injunctions of future collections for which there is no "colorable basis" -- economic efficiency -- provides no justification for interfering with Congress' comprehensive scheme for managing refund claims. In such a circumstance, the taxpayer and the national economy necessarily will incur the cost of processing a refund claim. Moreover, they will incur that cost regardless of the egregiousness of the alleged mistake in collecting the tax in the first place. Thus, where, as here, the allegedly improper collection of taxes has already occurred, the Enochs' "colorable basis" test is irrelevant.

Second, the "colorable basis" test is unnecessary. Underlying that test is a latent concern for the Government's potential overzealous collection of taxes, the historical roots of which are deeply rooted in American political thought. Fortunately, that concern does not arise where, as here, a private tax collector could not -- and did not -- benefit from overcollection. Private tax collectors are bound by law, on pain of criminal sanctions, to pay over to the IRS twice monthly all of the excise taxes they collect. *See* 26 U.S.C. §§ 6302, 7201, 7202; 26 C.F.R. § 40.6302(c)-3. Thus, there is little danger that private tax collectors will become overzealous in their collection duties. Moreover, even if a private tax collector were to become too aggressive, an adequate remedy at law (an administration claim to the IRS, followed -- if necessary -- by a civil action against the Government) would be available. Where private tax collectors are involved, therefore, the "colorable basis" test is as unnecessary as it is irrelevant.

Third, the "colorable basis" test unduly complicates the disposition of tax-refund cases against collecting agents by involving courts in unwarranted case-by-case line drawing. To achieve the efficiency goals of Section 7422, district courts must be able to determine its applicability via a

motion to dismiss disposed of before the burdens of class-action discovery extort a settlement from the beleaguered defendant collecting agent. The district court must be able to determine whether Section 7422 bars suit against the collecting agent without first allowing discovery concerning the alleged egregiousness of the challenged collection or the mental processes or motives of the agent in making the challenged collection. In short, the district court must be able to determine the applicability of Section 7422 from the face of a well pleaded complaint and the pages of the Internal Revenue Code.

Fortunately, the plain language of Section 7422 supplies an appropriate test. By its express terms, Section 7422 bars all claims, however denominated or pleaded, that seek "recovery of ***any*** internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of ***any*** sum alleged to have been . . . in ***any*** manner wrongfully collected" as a federal tax. 26 U.S.C.S. § 7422(a) (Lawyers' Co-op. 1995) (emphasis added). Under this plain language, a court presented with a motion to dismiss under Section 7422 should simply determine whether the suit seeks "recovery of ***any internal revenue tax*** alleged to have been erroneously or illegally assessed or collected . . . ." To do so, the court should compare the allegations of the complaint to the pages of the Internal Revenue Code and ask whether the Code imposed on some or all of the defendant's transactions with its customers an "internal revenue tax" of the sort underlying the plaintiffs' suit. Where, as here, the plaintiffs challenge an allegedly illegal collection of an actual "internal revenue tax" that was applicable to some, though not all, of the defendant's transactions with its customers, the court should dismiss the suit under Section 7422, without any consideration of the presence or absence of a "colorable basis" for collecting the tax from the plaintiffs.[14]

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[14]Here, the statute books plainly reveal that 26 U.S.C. § 4261 imposed on air-passenger tickets an excise tax of the sort Southwest is

Finally, Petitioners' "colorable basis" argument proves too much. If the lack of a "colorable basis" for a particular collection were sufficient to justify ignoring the bar erected by the plain language of Section 7422(f), the lack of a "colorable basis" should also be sufficient to justify ignoring the exhaustion requirement of Section 7422(a) in actions against the Government. Because the *Enochs* Court clearly did not intend that result, it is not surprising that "[t]he *Enochs* exception . . . has never been applied to allow a taxpayer to sue a private tax collector for the refund of erroneously collected taxes." Pet. App. at A9.

ii. 26 U.S.C. § 7501 Impliedly Pre-empts Petitioners' State-Law Claims.

Although the Fifth Circuit's ruling regarding 26 U.S.C. § 7422 made it unnecessary for the Court of Appeals to

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accused of illegally collecting from Petitioners. Throughout 1995, that tax applied to some but not all of Southwest's transactions with its customers. In particular, it applied to purchases of tickets sold in 1995 for travel in 1995 but not to purchases of tickets sold in 1995 for travel in 1996. Under Section 4261, a customer who purchased two tickets on November 15, 1995 -- one for travel that day and another for a separate trip sixty days later -- clearly had to pay the tax on at least one of those two tickets. Thus, applying the test embodied in the plain language of Section 7422 properly produces a dismissal of Petitioners' claims in this lawsuit for recovery of monies alleged to have been illegally or erroneously collected as excise taxes under Section 4261.

In contrast, no provision of the Internal Revenue Code has ever imposed Petitioners' hypothetical "carry-on luggage tax" (*see* Petition at 10; Pet. App. at A8) on any ticket sold by Southwest. Thus, application of the test embodied in the plain language of Section 7422 would not produce a dismissal of Petitioners' hypothetical action brought by a passenger alleging that she had been improperly charged a "carry-on luggage tax." Nor would the application of the plain language of Section 7422 require dismissal of the "con man" case hypothesized in *Kaucky* (*see* 109 F.3d at 352), as the Internal Revenue Code has never imposed any tax on any of the con man's transactions with his victims.

In short, the plain language of Section 7422 properly distinguishes this case from those that should be allowed to go forward, and it does so without involving district courts in wasteful, case-by-case line drawing concerning the alleged egregiousness of challenged collections.

analyze Petitioners' state-law claims in light of any other provision of the Internal Revenue Code, those claims also conflict with -- and, thus, are impliedly pre-empted by -- 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States -- not for taxpayers. *See* 26 U.S.C. § 7501 (providing that amounts withheld or collected as federal taxes by private tax collectors "shall be held to be a special fund in trust for the United States"); *see also Begier v. Internal Revenue Service*, 496 U.S. 53 (1990) (private tax collector need not segregate monies it collects as taxes or pay them to the IRS for those funds to constitute taxes held in trust exclusively for the benefit of the United States).

Further, Petitioners' state-law claims conflict with abundant authority holding that, in its role as excise-tax collector, Southwest acts not as the agent of taxpayers but as the agent of the United States. *See* Pet. App. at A7 ("Southwest acts as the government's agent in collecting airline ticket excise taxes."); *Kaucky*, 109 F.3d at 351 (same); *Eisenman*, 1997 WL 432032, *7 (in collecting excise taxes, "Continental acted as an agent of the IRS"); *AT&T*, 428 F. Supp. at 1306 ("The duty to collect [excise taxes] was imposed upon [non-governmental collection agents such as Southwest] by statute -- enforceable, if necessary, by criminal liability -- ***for the convenience of the United States***. . . . In . . . collecting the tax and paying it over to the government [such collection agents] ***act merely as agents for the United States***.") (emphasis added); *see also Meggs*, 561 F. Supp. at 1230 (noting that, in withholding payroll taxes from employee's wages, employer was acting as "agent of the government"); *Econ*, 351 F. Supp. at 1089 (holding that the real party in interest and the only proper defendant in an action to recover excise taxes alleged to have been erroneously or illegally collected is the United States).

Thus, Petitioners' state-law claims are not only ***expressly*** pre-empted by 26 U.S.C. § 7422, *see* Pet. App. at A10; *Kaucky*, 109 F.3d at 351-53; *Lehman*, 930 F. Supp. at 916, but also ***impliedly*** pre-empted by 26 U.S.C. § 7501,

which provides that Southwest, as the agent of the United States, holds monies collected as taxes in trust for the Government rather than for the taxpayers. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 1487 (1995) (implied pre-emption occurs where applying state law would conflict with federal law).

B. Petitioners' Federal Claims Also Fail as a Matter of Law.

Like Petitioners' state-law claims, their federal claims under 26 U.S.C. § 6415(c) also fail as a matter of law. First, Section 6415(c) applies only to over-collections of lawful taxes caused by mechanical or clerical errors. Section 6415(c) is irrelevant where, as here, taxpayers seek recovery of monies alleged to have been erroneously collected without legal authority. Second, even if Section 6415(c) were applicable, it would not assist Petitioners, because it provides no private right of action. Thus, the Fifth Circuit properly affirmed the dismissal of Petitioners' federal claims under Section 6415(c).

i. 26 U.S.C. § 6415(c) Is Inapplicable.

As Judge Weinfeld correctly concluded some twenty years ago in the *AT&T* case, Section 6415(c) was not designed, as Petitioners suggest, simply to address a situation in which several claimants complain of the same improper collection of a small amount of money. *See AT&T*, 428 F. Supp. at 1304-05 & nn. 30-34. Although the efficacy of allowing informal refunds under Section 6415(c) may be more apparent when a multiplicity of small refund claims arise from the same mechanical or clerical mistake in calculating the amount of tax due, Section 6415(c) was intended to deal with improper collections of a particular ***type*** rather than improper collections of a particular ***size*** or ***frequency***.

In particular, Section 6415(c) was intended to deal with overcollections of lawful taxes occurring through mechanical errors and clerical mistakes rather than erroneous

collections arising from faulty interpretations or applications of the tax code. As demonstrated *supra* at 8-15, Section 7422, which requires the participation of the United States, provides the ***exclusive*** remedy for taxpayers who complain that federal law did not authorize the challenged collection. *AT&T*, 428 F. Supp. at 1305 ("Treasury regulations first promulgated in 1932, when the communications [excise] tax was enacted in its present form, and still applicable today, make it clear that a credit may be taken [under Section 6415] ***only*** when the overcollection was due to a 'clerical or mechanical error.' In ***all*** other cases, the regular refund procedure [established by Section 7422] must be followed.") (emphasis added). Section 6415(c), which does not contemplate participation by the United States, addresses only claims by taxpayers who assert that, through mechanical or clerical error (e.g., a misplaced decimal point), a lawful tax was overcollected. *See id.* at 1305 & nn. 32, 34 (quoting 26 C.F.R. § 301.6415(c) (1976) for the proposition that Section 6415(c) applies only "in cases where the overpayment was the result of a clerical or mechanical error" and quoting the predecessor of 26 C.F.R. § 301.6415(c) (1976), Treas. Reg. 43, Art. 65, 66 (1921), for the proposition that the predecessor to Section 6415(c) similarly applied only "to cases where, as the result of some clerical or mechanical error, an excess amount has been collected or paid" and that, "[i]n all cases where tax has been collected and such collections are alleged to be *illegal or erroneous*[,] it will be necessary for the person so paying the tax to file claim for refund.") (emphasis in original); *see also* Pet. App. at A11 ("Section 6415(c) on its face is limited to 'overcollection' of excise taxes, which has historically been distinguished from 'illegal' or 'erroneous' collection under Section 7422."); *Lehman*, 930 F. Supp. at 915 (holding that, "at most," Section 6415(c) "allows a claim for mathematical and technical errors, not for the general interpretation of a class of claims"). *Cf. Kaucky*, 109 F.3d at 353 (noting that Section 6415(c) "may be limited to errors in computation").

That the IRS might view the governing tax law to be sufficiently clear in a particular instance that the United States need not participate in a specific refund proceeding does not mean, as Petitioners suggest, that such a case should be labeled as one involving only clerical or mechanical errors subject to private disposition under 26 U.S.C. § 6415(c). What matters is that the alleged error is one of law rather than one of arithmetic. Pet. App. at A11-A12; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 915. Where, as here, the alleged error is one of law, the refund claim falls within a class of claims that Congress has said must be presented to the IRS in accordance with the procedures established by 26 U.S.C. § 7422, even if, in a particular case, the Government would prefer informal resolution under Section 6415(c). Where, as here, the alleged error is one of law, the tax collector ***may*** make refunds to customers if it so chooses, but it cannot be compelled to make such refunds, and its decision to do so voluntarily clearly cannot bind the United States in the event that the Government ultimately takes the view that the challenged collections were proper. Thus, the Government's interest in a particular refund claim, which can be determined only on a costly and time-consuming case-by-case basis, is irrelevant to the question whether a claim should proceed under the strict procedures of 26 U.S.C. § 7422 or under the more informal mechanism envisioned by 26 U.S.C. § 6415(c).

Also irrelevant is Petitioners' insistence that equity requires that Section 6415(c) govern this case. As demonstrated above, Section 6415(c) was enacted solely to allow private tax collectors to remedy clerical or mechanical errors in the collection of lawful taxes. Pet. App. at A11-A12; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 1304-05 & nn. 30-34. While Petitioners labor mightily to convince the Court that this particular case, because of the potential number of claimants, could be more efficiently resolved by the District Court under Section 6415(c) than by the IRS under Section 7422, they provide no analytical basis

for their contention that this case is of a type that Congress intended to be governed by Section 6415(c) rather than by Section 7422. Without such an analytical basis, Petitioners' argument is merely an invitation to rewrite the law.[15]

ii. 26 U.S.C. § 6415(c) Provides No Private Right of Action.

Even if Section 6415(c) were interpreted to impose a mandatory duty on Southwest to refund to Petitioners the excise taxes Southwest collected regarding 1996 travel, Petitioners would have no private right of action against Southwest under Section 6415(c).

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court directed the lower courts to consider four factors in determining whether to recognize an implied right of action under a federal statute:

a) Is this plaintiff one of the class for whose "especial" benefit the statute was enacted? In other words, does the statute create a federal right in favor of the plaintiff?
b) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
c) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

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[15]Even if Petitioners' argument were to make ***analytical*** sense, their suggestion that refund claims can be efficiently resolved through class-action litigation under Section 6415(c) still would make no ***practical*** sense. The expenses that members of the putative class would encounter in prosecuting administrative claims with the IRS would be dwarfed by the costs attending judicial management of such claims through the class-action device. Drafting, printing, and mailing individual class notice would easily cost ten times as much as the stamps required to mail class members' administrative claims to the IRS. Further, even if no jury trials were required, drafting, printing, and mailing claim forms to class members would waste tremendous resources, as the IRS already has an adequate form, as well as personnel and computers to process claims.

d) Is the cause of action one traditionally relegated to state law, or would it otherwise be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78; *see also Mehrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1256 (1996); *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S. Ct. 513, 516 (1988); *Merrill-Lynch Pierce, Fenner & Smith, P.C. v. Curran*, 456 U.S. 353, 374-78 (1981); *Middlesex Cty. Sewer. Auth. v. National Sea Clammers Ass'n*, 453 U.S. 11, 15 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 23-34 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 690 (1979). As the Fifth Circuit correctly concluded, the application of these criteria in this case compels the conclusion that, even if Section 6415(c) were applicable to the collections challenged in this case, it would provide Petitioners' no private right of action against Southwest.[16]

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[16]Petitioners' assertion at pages 24-25 of the Petition that the Fifth Circuit's application of a presumption against implying private causes of action under federal statutes, *see* Pet. App. at A13, conflicts with this Court's decisions in *Cort* and its progeny is meritless. As the Court recognized in *Merrill Lynch*, the four-part *Cort* analsis was a marked departure from the Court's prior rule that "congressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was enacted to protect." 456 U.S. at 377, 102 S. Ct. at 1838. Thus, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Court held that, "[i]n the absence of strong indicia of a contrary congressional intent, [courts] are ***compelled*** to conclude that Congress provided precisely the remedies that it considered appropriate" and no more. 453 U.S at 15, 101 S. Ct. at 2623 (emphasis added). The Fifth Circuit's conclusion that *Cort* makes congressional ambiguity and silence cut against Petitioners and that Petitioners therefore bear a "relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed" Section 6415(c), Pet. App. at A13, is perfectly consistent with this Court's holdings concerning implied rights of action. *See Cort*, 422 U.S. at 82-83 (relying on the lack of any suggestion in the legislative history concerning private causes of action as strong support for denying the claim); *see also Touche Ross*, 442 U.S. at 571 (where the statutes and legislative history are silent on the question of a private remedy,

a. Section 6415(c) Grants No Special Rights to Taxpayers.

Under the first *Cort* factor, courts ask whether the plaintiff belongs to an identifiable class of persons upon whom the statute has conferred a substantive right. *See Cannon* , 441 U.S. at 690. To determine when such specific rights arise, courts look to the "right- or duty-creating language of the statute," which "has generally been the most accurate indicator of the propriety of implication of a cause of action." *Id.* at 690 n.13.

Nothing in Section 6415(c) or Section 7422 creates a federal right in favor of Petitioners. Rather, as Judge Weinfeld concluded in *AT&T*, those provisions of the tax code are designed to increase administrative efficiency and reduce the Government's burden of collecting and, if necessary, refunding federal taxes. *AT&T*, 428 F. Supp. at 1305 (Section 6415(c) "is intended merely to simplify the procedures for adjustment of minor errors in tax collection, and not to carve out sub silentio an exception to the orderly structure of tax litigation by allowing persons seeking to litigate major and disputed questions of tax law to bypass the normal refund procedure"). Thus, the primary beneficiaries of those provisions are not tax***payers***, but, rather, the United States and its private tax ***collectors***. Thus, Petitioners fail the first prong of the *Cort* analysis.

b. Congress Intended No Private Cause of Action.

Even where specific federal rights are granted, the inquiry remains one of Congressional intent -- that is, whether Congress actually intended to create a private remedy. *See, e.g., Thompson*, 484 U.S. at 179; *Touche Ross*, 442 U.S. at 568. "[A]s with any case involving the interpretation of a statute, [the] analysis must begin with

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"implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

the language of the statute itself." *Touche Ross*, 442 U.S. at 568).

Here, the plain language of Section 7422 expressly bars all tax-refund suits except those brought against the Government after exhaustion of administrative remedies. *See supra* at 8-15. Section 7422 makes no exception for suits brought against collecting agents under Section 6415(c). *See AT&T*, 428 F. Supp. at 1304-06. Thus, the plain language of Section 7422 confirms that Congress intended no private remedies against collecting agents under Section 6415(c). *See* Pet. App. at 8-15; *Kaucky*, 109 F.3d at 353; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 1297. As Judge Weinfeld explained some twenty years ago, there is no indication in the scant legislative history that Congress intended a contrary result. *See AT&T*, 428 F. Supp. at 1304-05; *see also* Pet. App. at A13 ("Nothing indicates that Congress intended Section 6415(c) to create an exception to Section 7422 that would allow excise taxpayers to seek relief from the courts in the first instance."); *Kaucky*, 109 F.3d at 353 ("[T]here is no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization."); *Lehman*, 930 F. Supp. at 914-15 (quoting with approval Judge Weinfeld's analysis of the legislative history of Sections 6415 and 7422). If anything, the modest legislative history confirms that Congress had no intention to allow refund suits against private collecting agents. *See* S. Rep. No. 1625, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 3676, 3677, 3681. Thus, Petitioners fail the second prong of the *Cort* analysis as well as the first, and their effort to recover under Section 6415(c) must be rejected.[17]

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[17]As the Court held in *Transamerica Mortgage Advisors*, 444 U.S. at 15-16, 23-34, the four *Cort* factors are not of equal weight. Where, as here, neither the statutory language nor the legislative history reveal congressional intent to create a private right of action, the judicial inquiry must end with a refusal to imply a cause of action. *Id.*; *see also Touche Ross*, 442 U.S. at 568.

c. Implying a Cause of Action Would Frustrate the Goals of Section 7422.

Petitioners also fail the third *Cort* criterion, because the private cause of action Petitioners seek would frustrate the primary goal of the tax code: the orderly administration of the federal taxes.

To ensure the efficient and orderly administration of tax-refund claims, Congress created administrative processes through which aggrieved individuals may submit tax-refund claims to the IRS. To ensure that such claims do not unduly interfere with tax collections, Congress has imposed exacting requirements on taxpayers seeking refunds, including the duty to seek administrative relief before going to court. *See* 26 U.S.C. § 7422.

By suing Southwest, a private collecting agent, Petitioners are attempting an end run around the procedural requirements Congress has enacted to ensure the efficient administration of federal taxes. If Petitioners' claims are allowed,

> [Petitioners] will have succeeded in avoiding the strict procedural requirements for obtaining refunds. In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively, and without being subject to the statutes of limitations imposed by the Code. This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.

AT&T, 428 F. Supp. at 1303; *see also* Pet. App. at A14-A15; *Kaucky*, 109 F.3d at 353; *Lehman*, 930 F. Supp. at 915.

Congress intended to provide through 26 U.S.C. § 7422 a fair and manageable system for adjudicating tax claims and thus established that system as the ***only*** vehicle through which judicial review of tax liability can be obtained. Not surprisingly, therefore, the courts have steadfastly enforced Congress' procedures for processing tax-refund claims. *See, e.g.*, *Snyder v. Marks*, 109 U.S. 189, 193 (1883) ("The remedy so given [by the Code] is exclusive, and

no other remedy can be substituted for it."); *Flora v. United States*, 362 U.S. 145, 176 (1960) (expressing need to protect "the harmony of our carefully structured twentieth century system of tax litigation"); *Poretto v. Usry*, 295 F.2d 499, 501 (5th Cir. 1961), *cert. denied*, 369 U.S. 810, 82 S. Ct. 687 (1962) (noting that the Code's procedural requirements are "mandatory and exclusive"). Because the cause of action Petitioners seek would undermine rather than advance Congress' goal of ensuring the orderly administration of the tax laws, Petitioners also fail the third prong of the *Cort* analysis.

d. Adequate Remedies Already Exist.

The fourth *Cort* factor asks whether implying a federal cause of action is inappropriate because another body of law, whether state or federal, already provides adequate legal remedies. As noted *supra* at 25, ample remedies already are available to Petitioners, as Congress has created in 26 U.S.C. § 7422 an administrative remedy for taxpayers and provided for judicial review once that administrative remedy has been exhausted. Where, as here, the absence of any basis for inferring an intent to create a civil cause of action appears in a statutory scheme that provides for criminal enforcement, *see* 26 U.S.C. §§ 6672 & 7202, and expressly provides administrative and judicial remedies, *see* 26 U.S.C. § 7422(a); 28 U.S.C. § 1346(a)(1), implying a civil cause of action is particularly problematic. *See Cort*, 422 U.S. at 78-79. In such a case,"it is entirely appropriate . . . to relegate [Petitioners] to whatever remedy is created by [existing] law." *Cort*, 422 U.S. at 84. Thus, Petitioners also fail the fourth *Cort* factor.[18]

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[18]In *Cort*, the existing remedies were based on state law; here, the existing remedy is federal. The principle, however, is the same: courts should not create rights of action through implication when adequate legal remedies already exist.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820
Attorneys for Southwest Airlines Co.